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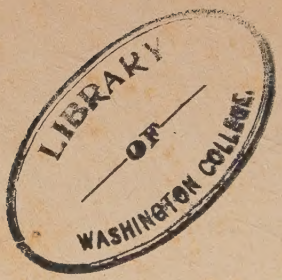

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LAW IN THE MODERN STATE

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Law in the Modern State,

by Leon Duguit, Professor of Law in the University of Bordeaux.

Translated by Frida and Harold Laski

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TRANSLATOR'S PREFACE

THE translation of this book is the joint work of my wife and myself; for the introduction, I am alone responsible. I have to thank the editors of the Harvard Law Review for permission to reproduce certain passages from an article of mine in that periodical, and M. Duguit for his generous willingness that I should add a few notes where they appeared likely to assist the general reader. For myself, I should like to add that my wife has borne by far the greater share in the labour of translation.

H. J. L.

INTRODUCTION

I

THIS volume would hardly have needed an introduction had the general attitude it represents been at all widely known in English-speaking countries. But continental theories of jurisprudence have not found a generous welcome where the writs of common law have established their dominion. Notable comment, indeed, there has been; above all, as when Mr. Justice Holmes and the late Professor Maitland showed us how wide must be our search if we would discover the roots of our law. But just as, on the continent of Europe, English jurisprudence has meant little more than an odd reference to Austin, and a partisan perversion of Sir Henry Maine, so, amongst ourselves, names that symbolize great discussion abroad—Eugen Ehrlich, Duguit, Stammler, Geny—remain but little known. An effort, indeed, has been nobly made to apply what seems most permanent in their teaching to the fundamental principles of Anglo-American law; and it is probable that the historian of the next age will regard the work of Dean Pound as an epoch in our jurisprudence. But this is a movement still in its first, fitful beginnings; and it is perhaps worth while to emphasize

some of the more notable theories set forth in this book.

And first of its perspective. We seem on the threshold of a new political synthesis. The movement towards what is vaguely called the socialization of law is, in fact, symptomatic of something far deeper and wider in its bearings. Distinguished thinkers all over the world have not hesitated to examine with scant respect the traditional theory of representative government. Psychologists like Mr. Graham Wallas,[1] sociologists like M. Emile Durkheim,[2] political theorists like Mr. Ernest Barker,[3] publicists like Mr. Herbert Croly[4] and Sir Sidney Low,[5] are all of them insistent that the classic defence of representative government—in the main, a product of the Benthamites—has broken down. The great society has outgrown the mould to which the nineteenth century would have fashioned it. The life of the community can no longer be contained in, or satisfied with, its merely political achievement. It is not so much the general content of our ideals that has been called into question. Rather has a grave doubt been raised whether the present mecha-

[1] *Cf.* his Human Nature in Politics (1908).

[2] *Cf.* his contribution to the Libres Entretiens (4me série) 1906.

[3] *Cf.* his article, The Discredited State, in the Political Quarterly for Feb., 1915.

[4] *Cf.* his Promise of American Life (1904); Progressive Democracy (1915).

[5] *Cf.* his Governance of England (revised ed., 1914).

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nisms of politics are likely to take us much further in the direction of their attainment.

It was inevitable that, sooner or later, this scepticism should penetrate the sphere of jurisprudence; and, since it was, above all, the effort of Revolutionary France which outlined the character of the modern state, it was in some sort fitting that in France again the attempt to undermine its foundations should have been begun. The national sovereignty which Rousseau made the central dogma of modern politics meant, so soon as the working class became articulate, an immense increase of governmental functions; and in a country which, like France, still retains the large outlines of Napoleon's administrative settlement, this has meant a centralization such as the traditional localism of England and America can hardly understand. Hence, of course, the revolt against étatisme which, in its broad perspective, seems to have arisen about the time of the Dreyfus case.[6] The republic did not emerge unscathed from that tremendous ordeal. It had to turn its hand to the overwhelming labours involved in a general law of associations, on the one hand, and the separation of church and state on the other. But, even then, its difficulties had hardly begun.

The general democratic movement had left untouched the whole process of administration.[7] Its hierarchical organisation was inherited directly from

[6] *Cf.* Daniel Halévy, Apologie Pour Notre Passée (1910).
[7] *Cf.* Laski, Authority in the Modern State, chap. v.

the *ancien régime,* and Napoleon did no more than make it efficient. The result was to leave the civil service at the mercy, directly, of the minister and, indirectly, of the deputy who had favours to bestow and candidates for their reception. The law of associations, passed under the ægis of M. Waldeck-Rousseau, strengthened a movement towards trade-unionism in the civil service which, though earlier in origin, did not become effective until the protection therein offered by the law opened up a profitable avenue of effort. The outstanding event in the decade between the separation and the war has been the challenge issued to the sovereignty of the state by its own servants. They claimed the right to protect themselves against its arbitrary acts. They demanded power to maintain their professional interests and standards exactly as the workers in an ordinary trade. If they did not obtain all they desired they received, at any rate, immense concessions. They revealed the growth of what M. Paul-Boncour has happily termed economic federalism—the desire of each industrial and professional group to render itself, for all internal purposes, an autonomous unit. It was a movement which essentially implied administrative decentralisation.[8] The effort of the state might be unified, but its methods of attainment could be various. And it became more than doubtful whether, in the new synthesis such decentralisation

[8] For an important criticism, however, see Dicey, Law of the Constitution (8th ed.), p. 134f.

involved, the sovereign state of the nineteenth century would not be superfluous.

Hardly less significant was the development of French trade-unionism.[9] The workers deserted the ideal of Marx, whose purpose was the capture of the bourgeois state, and went back to the theories of Proudhon, who denied altogether its validity.[10] It is probable that we have been greatly misled by the attractive glamour which, in this connection, attaches to the work of Sorel and Berth. The real syndicalist movement is to be found in the workshops themselves, and in the effort of men like Pelloutier and Griffuehles to develop a complete economic and social life for the worker outside the traditional categories of the state. Political action has not been so much despised as ignored. The French chamber has been regarded as simply irrelevant. Whatever its pretensions, the Revolutionary state has been dismissed as an institution doing for the commercial middle class what feudalism achieved for the landowning aristocracy. Its sovereign power has been simply the most effective weapon by which it has served its purposes. The significance of the return to Proudhon lies in the fact that he sought in a federalist organisation of society the clue to freedom. He understood, as Marx never understood, that the

[9] The best account is in L. Levine, Labor Movement in France (1912).

[10] *Cf.* Pirou, Proudhon et le Syndicalisme Révolutionnaire (1911).

root of the industrial problem lies less in an indignant sense of exploitation than in an eagerness to share in the determination of working conditions. He gave no quarter to the nationalisation which was the result of Marx's teaching. Rather did he insist that only by the destruction of the centralised bureaucracy created by the Revolution could freedom become effective. He grasped, in fact, what has been the main motive to combat in the ideals of modern French trade-unionism.

Two other streams of thought are hardly less important. The decline of parliamentary government in France is, of course, only part of the general bankruptcy which confronts the representative system completed by the nineteenth century.[11] Its evils have in France been perhaps more strikingly apparent than elsewhere; and the failure of any government to give serious attention to the necessary administrative reforms has led to more than one serious crisis. Not, indeed, that the general atmosphere of scepticism has, in any general fashion, led men away from the republic; but it has served to demonstrate the necessity of searching out new sources of political method and insight. The second stream is related to this necessity, though it is historically far older. What is termed regionalism is, under a va-

[11] *Cf.* Guy-Grand, Le Procès de la Démocratie. Wallas, Human Nature in Politics, Introduction. I may perhaps refer to my Problem of Administrative Areas, Smith College Studies, Vol. IV, No. 1, for a discussion of the technical problem involved.

riety of forms, simply a protest, which goes back to the federal theories of the Girondins, against the absorptiveness of Paris. That, as Lamennais observed seventy years ago, causes "paralysis at the extremities and apoplexy at the centre." It is a movement which seeks the reconstitution of French local life under all its most varied aspects. It refuses to accept as adequate any administrative reform which merely aims at deconcentration. Whether it seeks the reconstruction of the ancient provinces, the creation of entirely new areas of administration, the use rather of professional than of territorial groupings, every section of the movement is determined that the Napoleonic completion of the *ancien régime* must disappear.[12]

Lastly, it is important to remember the legal background in which these varied forces have been working. The traditional theory of the state made it the effective guardian of public order and gave to it the weapon of sovereignty that it might achieve its purposes. By sovereignty was largely meant the right to act without being called to answer for such policy as it might consider essential to its aims. It was regarded as a person, with the significant limitation that the possession of its rights did not involve, save as an act of grace upon its own part, an assumption of proportionate legal responsibility. In England, for example, the Crown can not be sued save by per-

[12] *Cf.* Charles Brun, Le Régionalisme (1911)—the highest authority upon this subject.

mission of the Attorney-General. All sorts of limitations surround the effort to sue the American state; though certain constitutional guarantees, and notably the fifth and fourteenth amendments, have been intended to limit state-omnicompetence. In France and Germany, the performance of public functions acted as a release from ordinary legal responsibility. The divine right of the monarch seemed, by the convenient fiction of national sovereignty, to be transformed into what, if not by definition then certainly in result, is the divine right of the state.

II

In such an atmosphere, it is against this theory of the sovereign state that M. Duguit's work has been a magistral protest. His earliest book remains its fullest exposition.[13] In a treatise on constitutional law which, in the breadth of its analysis, challenges comparison with Esmein's almost incomparable study, he has traced its ramifications through the field best fitted to display its import.[14] In three lectures at the Ecole des Hautes Etudes Sociales, he has effectively summarised their bearing.[15] The volume here translated relates his theories to the whole course of modern public law, and is, perhaps, the best summary of their general result.

The starting-point of M. Duguit's attitude is, in

[13] L'Etat, 2 vols. (1901-3).
[14] Traité de Droit Constitutionnel (1911).
[15] Le Droit Social, Le Droit Individuel, et L'Etat (1908).

reality, a sociological interpretation of the state. He does not discuss the philosophic background of law, and has been, indeed, somewhat unduly contemptuous of all legal metaphysics. He starts from the obvious fact of social interdependence. We are members one of another. Observation reveals to us a mass of individuals, each with his own part to play in the world. Social life is constituted by the interrelation of those functions. This fusion of teleologies suggests, each in its due context, general principles of social conduct. Collectively, they represent what we are accustomed to term the moral code; and law is simply the sum of those principles within that code which have won a general legal sanction because they are necessary to the achievement of the social purpose.

This rule of law is, clearly, independent of the state, and, indeed, anterior to it; for it is the principle on which the life of society—far vaster in extent than the state—depends. It is imposed on private persons, either by their compulsory co-operation to achieve the fullness of social solidarity, or by their prevention from performing such acts as might prevent any individual from contributing his utmost to the common good.[16] It is imposed upon public persons, even more than upon private, because their situation makes incumbent upon them a greater sense of their responsibility for its realisation. These pub-

[16] *Cf.* Bosanquet, Philosophical Theory of the State (1909), p. 187f.

lic persons are, in their totality, what we call government; for, to M. Duguit, a state is simply a society divided into government and subjects. It would, then, be clearly absurd if the more important position of government, relative to the general social end, did not involve greater responsibility for that end.

What, then, is the function of government? By legislation, it lays down the principles by which the rule of law is to be attained; by administration, it translates into effective terms those principles thus made into statutes. Certain things, obviously, it must recognise. It must respect the equality of men; by which is meant, not their identity, but the general needs common to them all, of which food and shelter are the most obvious instances. It must not place hindrances in the way of each man's development, save in the protection of the common freedom. It must, for example, allow him freedom of thought, of instruction, and of religion, because experience has shown that, without these, individuality is stunted. It must not, similarly, impose on any persons a system of caste. It must declare nugatory any individual act which is antithetic to its rule of law. If, for example, experience has shown that the use of certain materials in industry is dangerous to the health of those therein employed, it is the duty of government to prohibit that use.[17] Above all, since these

[17] On the growth of governmental power with new social experience *cf.* the observations of Mr. Justice Holmes in Noble State Bank v. Haskell, 219 U. S., 104.

duties are often, for a variety of causes, likely to be unfulfilled, or, at least, but partially performed, the government should organise securities that can be used by the private citizen to compel their enforcement. If this negligence continues, the right of insurrection necessarily remains as the ultimate reserve power.

In such an attitude we have all the materials for a theory of the state. Experience is to suggest a rule of right conduct, and the aim of the state is its realisation. The state is beneath the law; for, by its very definition, it is an instrument and not an end. Nor is that rule of conduct unchanging; for it is clear that it must relate itself to the peculiar circumstances of each environment in each age. But it is to be noted that the conclusions annexed to this statement are not less radical. M. Duguit denies at once the sovereignty and the personality of the state. He denies its sovereignty, in the main, on the ground that its assertion is no longer consonant with the facts; though, indeed, his attitude follows logically from his affirmation that the needs of the rule of law are alone supreme. He denies its personality because he is determined to be relentlessly realistic in his analysis. The action of the state means, in cold fact, simply that certain officials have carried out the order of a minister; there is nothing in that which gives use to any personality differing from that of those concerned in the conception and performance of the order. It is true that the officials have wider powers

than the average citizen; but that does not make their acts in substance different.

This denial of sovereignty may be arrived at in another way. Sovereignty is born of rights. M. Duguit, in substance, denies all rights, and insists simply upon the existence of duties. Each of us has certain functions to perform, born of our position in society. Our duty is to perform those functions. Sovereignty would mean the unlimited and irresponsible will of those who exercise it; but they are, in strict fact, limited by the purpose it is to serve. They have power for their special function, and no more. Obviously, then, that power, being always relative, cannot be spoken of in terms implying either lack of limitation or responsibility. Everything is subject to the rule of law.

What, then, is the state in fact performing? Its function is to provide for certain public needs which are growing each day more varied, more imperative and more numerous. The whole theory of the state, indeed, is contained in the idea of public need. It is the performance by the mass of officials of their social function—the part assigned to them in that division of labour from which the ideal of social solidarity is born. A statute is simply the legislative settlement of such a function—the determination that some public need shall be served by government in a certain fashion. Administrative acts are simply the fulfilment of the statute—the creation of a special situation corresponding to the social need therein satis-

fied. These are not political in character—that is rather their corruption. They are simply technical operations which, like any other social act, are submitted, for their general validity, to the rule of law whence their necessity is ultimately derived.

In such an aspect it is obvious that the state is reduced to the position of a private citizen, since, like the latter, it is brought within the scope of an objective law. That reduction necessarily involves the notion of a full responsibility for its acts; and M. Duguit has been quick to note how the recent jurisprudence of the Conseil d'Etat is extending on every hand the idea of state-responsibility.[18] It is, however, a doctrine that makes against authoritarianism. The only justification for any public act is that its result in public good should be commensurate with the force that is involved in its exercise; but that, after all, is ultimately a matter for the private judgment of each one of us. A real impetus is thus given to the initiative of the private citizen. Room is left for that reservoir of individualism upon which, in the last resort, the welfare of society depends. No act, in his view, draws its justification from the fact that it is the result of will. He demands, rather, the research of reason into human needs and makes the rightness of an act depend upon an agreement with the conclusion of such enquiry.

Three practical and immediate consequences are obvious in such an attitude. M. Duguit seems clearly

[18] *Cf.* chap. vii below.

to believe in the virtue of a written constitution; or, at least, he emphasises the distinction between constitutional and ordinary legislation which is the main element in the debate. The reason for this conclusion really goes back to the central principle of his system; for the written constitution is nothing so much as an attempt to make the fundamental notions of its contrivers beyond the reach of ordinary legislative change. It logically follows, therefore, that he should not merely emphasise the value of judicial review of executive acts, but should seek to extend that control to the policy of the legislature. It is a policy still far distant; in the House of Commons, certainly, it has been, in the last decade, decisively rejected.[19] Judicial Review in America has been, of course, since *Marbury v. Madison*,[20] the corner-stone of the constitutional edifice. It is yet interesting to note that its main tendency, in recent years, has been to defeat the progress of exactly the type of measure upon the desirability of which M. Duguit would himself probably lay the gravest emphasis.[21] It has led to acrimonious discussion, in which a former president was led to urge the need for a recall of judicial decisions by popular vote[22]; and the most emi-

[19] Hansard, 5th series, 1912, vol. 42, p. 2229. Speech of Mr. Asquith.

[20] For a full account *cf.* Beard, The Supreme Court and the Constitution.

[21] *Cf.* Frankfurter, Hours of Labour and Realism in Constitutional Law, in Harv. L. Rev., Vol. 29.

[22] *Cf.* Brooks Adams, Theory of Social Revolutions, chap. i.

nent of American judges since the classic time of Marshall and Story has told us that he would see the disappearance of the power over Congressional legislation without regret. This is said, not so much in criticism of M. Duguit, as to indicate the presence of a difficulty in the face of legislative acts that is perhaps absent when executive policy is considered. It is, moreover, clear that in such a system the personnel of the courts raises grave problems. A foreigner in the United States cannot but observe with the deepest wonder how eagerly possible nominations for a vacant position on the Supreme Court are canvassed.[23] That is not merely true of the present time. From the period when Marshall assumed the chief justiceship to the Civil War, practically every serious political issue has sooner or later come to the Supreme Court for decision; and the method in which the United States became transmuted from a pioneer civilisation into the modern and positive state has largely been determined by the interpretation placed, since the Slaughter-House Cases, upon the meaning of the Fourteenth Amendment.[24] Obviously, therefore, the issue has somewhat wider bearing than is clear from any passing analysis.

M. Duguit, lastly, has emphasised the necessity of readjusting the theory of the state to the new perspec-

[23] *Cf.* the immense volume *cf.* testimony taken by the Senate Committee on the appointment of Mr. Justice Brandeis to the Supreme Court.

[24] *Cf.* Collins, The Fourteenth Amendment and the States.

tive given to it by the importance of social groups.[25] It is no longer possible, as he thinks, for a unified direction of the whole, centred in the Council of Ministers in Paris, or the cabinet in London, or, as in American experience, in the presidential mind alone, adequately to grapple with the issues that confront us. M. Duguit has nowhere drawn any full picture of the tendency that is emerging; but he seems to incline to an acceptance of that ideal of technical autonomy for each special public utility of which M. Leroy has been the sponsor. He seems also, though with some hesitation, to regard the trade-unions as destined one day to form an integral part of a state federalised not by regions but by functions. He repudiates, indeed, phenomena like the class-war; he does not admit the right to strike in the case of men publicly employed. In this aspect, it is perhaps worth noting that M. Duguit has been not a little influenced by the contemplation of feudal society. Class, to him, means simply a group of men whose functions have a specially kindred character[26]; and it is the function of such a class, as a unit in relation to the whole structure, that impresses him. This tends, perhaps, to give a somewhat static character to his analysis of the social disintegration that confronts us; or, rather, it emphasises more the fact of disintegration than the effort of reconstruction. For the

[25] *Cf.* the third lecture of Le Droit Social, Le Droit Individuel et L'Etat.

[26] *Cf.* Le Droit Social, Le Droit Individuel et L'Etat, p. 114.

latter, we must turn, on the one hand back to Proudhon, and his almost febrile suggestiveness,[27] on the other, to a host of men whose work is, in reality, nothing so much as the harvest of the seed M. Duguit has sowed.

III

It would be out of place here to attempt anything like a detailed criticism of the theories presented in this book.[28] Nevertheless, it is worth while to indicate the directions from which such criticism has come. Naturally enough, its main stream has been directed against M. Duguit's denial of the sovereignty of the state. M. Esmein, for instance, has restated against him the classic theory by his insistence that unless there is, in each state, some unchallengeable source of public authority, we have no effective legal guarantee of public order. Juristically, the argument does not seem answerable; for, in the legal theory of the state there must be some one authority beyond appeal. But while the criticism has legal validity, it is, in sober fact, politically worthless. The strength, indeed, of M. Duguit's analysis is in its political, rather than its juristic, application. So long as we are satisfied with the mere logic of a terminology, the juristic theory of sov-

[27] *Cf.* especially, Du Principe Fédératif—one of the great books of the nineteenth century.

[28] The bibliography contains a list of the more important articles upon his work.

ereignty will remain as impregnable to assault as it is inapplicable to the facts of life. For, as M. Duguit shows, it is when we attempt its test by its applicability to politics, the real problem becomes not so much the statement of authorities as the measure of influence. That, indeed, is the significance of Professor Gray's profound observation, that the real rulers of a society are undiscoverable. Certain, at least, it is that they do not coincide with the ordinary theory of jurisprudence.

More vital is the criticism that M. Duguit has not, as he assumes, suppressed in his system the idea of subjective law. The test of legal validity is, it is true, made the objective interpretation of the facts of life. But there is not anything like the unanimity of agreement as to the meaning of those facts which is implied in the assumption of unanimity. The nineteenth century, to take a single example, is essentially the period in which the fundamental content of the democratic hypothesis was elaborated; but an hypothesis which, in England alone, aroused eager and serious criticism from such minds as Fitzjames Stephen, Bagehot, Maine and Lecky, in a single generation, can hardly claim objectivity with any seriousness. The fact surely is that the notion of each one of us of what does represent the social need will so differ as merely to transfer the subjectivity involved from the order issued by the ruling officials to the judgment upon the validity of that order by the subjects who receive it.

So too, it may be suggested, with M. Duguit's denial of the existence of rights. He urges that the sole fact upon which a theory of the state can usefully be built is the fact of social interdependence; and from that tissue of relationships he postulates a system of duties for each of us relative to the function that is our lot. That clearly involves, however, the existence of such a social organisation as permits the full development of our capacity for that purpose; and this, of course, involves the condemnation of much of the present social order. But, if this bows out rights at the front door, it is only to admit them again at the back; for if our virtue is thus to be what T. H. Green called our positive contribution to social good, obviously we must demand, have the right to demand, that nothing shall hinder the performance of our service. We can even make a catalogue of the needs, physical or moral or political, we require to be fulfilled if that service is to be adequate; and such needs, whether or no we call them rights, will, in point of hard fact, represent substantially the same thing.[29] M. Duguit's criticism of rights, in brief, is applicable against the ascription to them of something eternal and imprescriptible; but it is hardly valid as against a theory of "natural law with changing content" such as that for which Stammler stands as sponsor.

What, indeed, as M. Geny has acutely pointed

[29] *Cf.* W. Wallace, Our Natural Rights, in his Lectures and Essays; and Laski, Authority in the Modern State, chap. i.

out,[30] is needed in M. Duguit's system is less the scientific denial of any metaphysic than the admission of the metaphysic in reality implied therein. For his refusal to take much heed of philosophic jurisprudence he has, indeed, support so distinguished as that of Mr. Justice Holmes, who seems to regard ideas of right and wrong as nothing more than desires that are based upon the verdict of a transient majority.[31] Such scepticism, it may be suggested, does not in reality meet the point against which it is postulated. The modern theory of natural law, with the ethical and psychological assumptions upon which it is based, does not lay down any eternal or immutable laws of human conduct; it simply urges that the research of reason cannot help reaching conclusions which are valid so long as the conditions they resume obtain. Such a generalisation must be the necessary basis of all political action; for a scepticism which refused to act except in the presence of mathematical certitude would never act at all. Nor is it necessary to depreciate the large number of cases in which unanimity is reached in the ascription of good. A legal metaphysic such as that of Cathrein, who defines the ends of law in terms of the theology of a specific church, may well be capable of immediate refutation; but a metaphysic which is at once

[30] Science et Technique en Droit Privé, Vol. II, p. 114.

[31] See his eloquent attack in the Harvard Law Review for November, 1918.

empirical and pragmatic, seems necessary to the functioning of any legal system. It is, in fact, no more than the teleology by reason of which it is existent.

Sovereignty apart, the main burden of the criticism M. Duguit has encountered, has centred about his denial of corporate personality. Where, indeed, as with M. Esmein, the doctrine is held as being no more than a fiction, the controversy is no more than a debate about its convenience. But with those who hold the doctrine in a wider form the issue, of course, goes deeper; for, at bottom, as Mr. Barker has pointed out, the real problem is the philosophic nature of universals, and goes back almost to the origins of thought. Here, it may perhaps suffice to say that the way in which the problem is to be regarded has not, on the continent, been stated in its most useful form. Anglo-Saxon jurisprudence has been fortunate in that its definition has come, not merely from one of the most distinguished, but also from one of the most practical-minded of lawyers. "Whenever men act in concert for a common purpose," Professor Dicey has written,[32] "they tend to create a body which, from no fiction of law, but from the very nature of things, differs from the individuals of whom it is constituted." The nature of that body is essentially a metaphysical enquiry; but that we are dealing with an activity that is unified, and must, therefore, as a unity, be made responsible, no one who is

[32] Law and Opinion in England (2nd ed.), p. 154.

conversant with the facts can for a moment dispute.[33] M. Duguit, certainly, does not deny it; for the admission is involved in the urgency with which he insists upon collective responsibility. He is, indeed, happily free from that sterile system of enquiry which enabled von Blüntschli to endow associations with sexual characteristics, or has enabled a generation of German students to search for the exact place of residence of the corporate will. It is better, for the purposes of practical jurisprudence, to deal rather with the external results of action than their inner nature; and in that sense, certainly, the result of a system so different from M. Duguit's as that of Michoud,[34] will, ultimately, be found to have similar consequence.

IV

Lastly, it may be worth while to point out the intellectual affiliations of M. Duguit in England and America. In England, for the most part, those ideas which approximate to his own have not come from the lawyers. The course of legislation, indeed, has for the past decade set in a definitely collectivist direction; and Professor Dicey has noted in the concurrent revival of the idea of natural law a phenomenon of which the results are not very different from those to which M. Duguit looks forward.[35] From this

[33] *Cf.* for the injustice that otherwise results, an article on the personality of associations in 29 Harv. L. Rev., 404.

[34] Theorie de la Personnalité Morale, 1906–9.

[35] Law of the Constitution (8th ed.), p. xxxviii.

standpoint, the direction of labour policy has been particularly important; and especially in its latest phase of what is called gild-socialism, it shows, in very noteworthy fashion, points of important contact with his theories.[36] His criticisms of parliamentary government have been independently worked out by Mr. Graham Wallas in two books that are already classic[37]; and if Mr. Wallas has been less constructive than critical, where he has dealt with problems of organisation, it has been obvious that the synthesis he envisages would meet with M. Duguit's keen sympathy. On the theory of sovereignty itself, the starting-point of all recent enquiry has been Maitland's classic analysis of corporate personality. Here, indeed, his conclusions have been antithetic to those of M. Duguit; but since Maitland denied the pre-eminence of the state-corporation over all others, the Austinian idol disappeared from his system. Dr. Figgis, in three admirable books,[38] has done much to dissipate the notion of an omnicompetent state; and no one has done more than he implicitly to answer the adverse criticisms of Professor Dicey upon the federal idea. The whole tendency in England, indeed,

[36] *Cf.* Cole, Self-Government in Industry esp., chap. iii. A curious volume, Liberty, Authority and Function by Ramiro de Maeztu, attempts to give gild-socialism a juristic basis in M. Duguit's ideas.

[37] Human Nature in Politics (1908); The Great Society (1914).

[38] The Divine Right of Kings (2nd ed., 1914); From Gerson to Grotius (2nd ed., 1916); Churches in the Modern State (1913).

has been to place a decreasing confidence in any final benefit from government action.[39] The social problems it has endeavored to solve have grown beyond the methods historically associated with its functioning, and the time is ripe for new discovery.

America is fortunately situated in this respect. The classic home of federalism, nowhere is there ground more fertile for such seed as M. Duguit has sown. It is, indeed, true that recent administrative tendencies in America have been towards a centralisation largely based on *raison d'état,* but that seems only a temporary synthesis.[40] A significant and striking opinion of Mr. Justice Holmes has emphasised the confidence of the Supreme Court in the federal adventure.[41] The pragmatic philosophy of law at which, in the last ten years, Dean Pound has so earnestly laboured is, at least in its large outlines, consistent with M. Duguit's conclusions. In a very learned work, Professor McIlwain[42] has offered a theory of sovereignty full of possibilities to the student of these French ideas; and Mr. Herbert Croly, perhaps the most penetrating of American observers, has noted, in a study of profound suggestiveness, the decline and fall of the sovereign state.[43]

[39] *Cf.* my Problem of Administrative Areas, §1-3 [Smith College Studies, IV, i].

[40] *Cf.* The New Republic, Vol. XII, p. 234.

[41] Noble State Bank v. Haskell, 219 U. S., 104.

[42] The High Court of Parliament (1910).

[43] Progressive Democracy (1915); and see his remarkable article, The Future of the State, in the New Republic, Sept. 15, 1917.

But it is above all in the background of English and American life that the broad accuracy of M. Duguit's interpretation finds its most striking proof. The whole background of American constitutionalism, for example, is a belief in the supremacy of reason. The very limitation of the much-criticised Fourteenth Amendment only means, as Mr. Justice Holmes has repeatedly emphasised, that legislation must be reasonably conceived, and adopt reasonable means of execution; and since that term is a matter of positive evidence, it is not a gate but a road. We are coming more and more to bring to the analysis of legal problems whatever facts seem likely to cast light upon their meaning. We are asking the state to justify its existence not so much by the methods it uses as by the results it can obtain. The decline of Congress, for instance, like the similar decline of Parliament and the French chamber, is to be interpreted in the light of its inability to cope with the new demands. We have ceased to look upon historic antiquity as the justification of existence; it is the end of each institution of which we make consistent dissection and enquiry.

In America, unlike England, there has been less speculation than elsewhere as to the new synthesis that is being evolved. The developments of professional representation in England, particularly since 1916, show clearly that the sovereign state of the nineteenth century is in process there of conscious transformation. In America, it is only within recent

years that the problem has become sufficiently acute to merit an urgent examination. Yet it is already obvious that the direction in which the American Commonwealth is travelling gives a new significance to ancient terms; and the political theory of the last generation will need, in large part, to be re-written. The kind of background for public law that M. Duguit has drawn serves with accuracy to describe the content of the changes we have been witnessing. Based, of course, on French experience, it needs adaptation to fit English or American affairs; yet, in its broad perspective, it is not inconsistent with the facts at issue. Certainly no student who patiently examined this effort could fail to draw from it at once enlightenment and inspiration.

H. J. L.

AUTHOR'S INTRODUCTION

IT IS perhaps worth explaining why there is a special importance in the present development of the theory of the State. Law, like every social phenomenon, is subject to perpetual change; indeed any scientific study of law must necessarily involve an analysis of the evolution of legal institutions. In a sense, therefore, the transformation of the State is also the transformation of its law.

But we must go a little deeper. The real justification of this book is the immediate situation of political theory. Just as every living being has moments in its existence when, even while obeying the general law of its life, it undergoes a change that is especially fundamental in importance, so it is in the history of peoples. Everything seems to make it clear that we are at such a stage in the history of the State. We are at a critical period not in any pessimistic sense but in one that is merely descriptive. However little we may like it, the evidence conclusively demonstrates that the ideas which formerly lay at the very base of our political systems are disintegrating. Systems of law under which, until our own time, society has lived, are in a condition of dislocation. The new system that is to replace it is built

on entirely different conceptions. Whether those conceptions mark a progress or a decline it is not our business to enquire. A scientific social theory can find no meaning in such terms. It can only point to the fact of significant difference.

It is no narrow change that we are witnessing. There is no legal institution it does not involve. Theories of private law, the family, contract, property, these, no less than the institutions of public law, are deeply concerned. And while this evolution knows no geographical boundaries save those of civilization, it has developed in France with peculiar intensity. It has seemed the mission of France to stand in the forefront of all epoch-making change in institutions and ideas; she holds open the gate through which the sister nations pass. There is thus perhaps a peculiar fitness in the study of these changes from the standpoint of its French significance.

I have elsewhere discussed this change in so far as it touches private law.[1] I propose here to discuss its relation to the theory of the state. Analysis will show that the two transformations are in fact parallel and similar. Not only do they come from like causes but they permit of resumption in an identical formula. A realistic and socialised legal system replaces an earlier system that was at once abstract and individualist in character.

[1] The Evolution of Private Law (1912). [This has been translated in the Continental Legal Historical Series in the volume entitled The Progress of Continental Law in the Nineteenth Century. Boston, 1918.]

The theory of the state under which the last century civilised peoples the world over have lived was based on principles which many people served with almost religious intensity. They were, so it was contended, entitled to the final loyalty of men. They were a political hinterland won for science. It was a system with an honourable history. It had its Declarations and its Constitutions. The legislation of the Revolutionary period gave to it a full expression in practical terms. That legislation had so profound an influence as to give those principles a unique prestige and special authority.

It is in these texts that the principles of the system are clearly formulated. Two fundamental ideas are the basis of their strength. The one is the theory of state-sovereignty of which the original subject is the nation regarded as a person, and the other the idea of a natural inalienable and imprescriptible right of the individual personality which is opposed to the sovereign right of the state. The nation, so we are told, has a personality distinct from that of the individuals who compose it. It has thus a will naturally superior to the wills of its constituent individuals simply because the collective person is superior to the individual person. This superiority consists in what we call public power or sovereignty. The nation is organized. It has built a government to represent it. That government acts as the agent of the national volition. It thus exercises in the name of the nation a sovereignty of which it cannot be deprived. The

state is thus the sovereign nation organised as a government and situated on a definite territory. The state as the organised nation is thus the subject of sovereignty and this public power gives to it the right to exercise a subjective law. It is by virtue of this law that it controls its members. Its commands are the exercise of this law.

Its members are at once citizens and subjects. As a part of the national collectivity which exercises sovereign powers, they are citizens; but since they are subordinated to a government exercising sovereignty in the name of the nation they are also subjects. Constitutional law is thus that mass of regulations dealing, first, with the organisation of the state, and, second, with the relation of the state to its members.[2] We have thus two unequal subjects of law. We have a superior, a juristic person formulating commands, and subjects obeying those commands. Clearly, therefore, such a constitutional system is in its very nature a subjective system. Its very basis is the subjective right of the state, as a person, to command.

The right of the state, then, is opposed to the subjective right of the individual. It is a natural right, at once inalienable and imprescriptible. It belongs to the individual by virtue of its humanity. It is a right anterior, even superior, to that of the state. For the state was founded to assure men protection for their individual rights. So it was proclaimed in the second article of the Declaration of Rights: "The

[2] *Cf.* Dicey, Law of the Constitution (8th ed., 1915), chap. i.

end of all political association is to preserve the natural and imprescriptible rights of man." Clearly, therefore, the first rule of constitutional law obliges the state so to organise itself as to secure the maximum protection of the individual rights of every human being.

This recognition of individual rights determines simultaneously both the direction and the limit of public activity. It is in itself the source of all rules regulating the relations of individuals to the state. The state is compelled to protect individual rights; but when the limitation of individual right is necessary to protect the general right the state possesses this limiting power also.

It is compelled to organize its defence against external enemies; for its self-maintenance is essential if the protection of individual rights is to be secured. The state then must organise an armed force for the purpose of war. It must also organise internal order, for it is by internal order that individual rights obtain social protection. For the latter purpose a police-service becomes important.

Finally the state submits itself to an objective law based on the subjective right of the individual. Two consequences flow from its obligation to secure the rights of individuality. In the first place, when legal conflict arises between the state and one of its members, it must be decided by a court that the state has organised with every guarantee of competence and impartiality. The decision of that court must

be accepted by the state. In the second place, if a dispute arises between two private citizens, the state again must settle it by a court which offers every guarantee of independence and capacity. A respect for the decision of that court must be made universal. For these purposes the judicial organisation is essential. We have, then, a sovereign power which is the subjective right of the nation organized as a state. That power is limited by the natural rights of the individual. The state as a consequence has the duty of giving the utmost protection to such individual rights. It is therefore compelled to limit those rights in so far as they conflict with the rights of all —an obligation which entails the creation and function of military, police and judicial services. Such, briefly, is the system of public law which, inherited from the past, was formulated with a marvellous precision by the legislation of the Revolution. It is a subjectivist system. To the subjective right of the state there is opposed the subjective right of the individual. Founded upon that right is at once a limitation of sovereignty and the imposition upon the state of certain duties. It is an abstract system; for it is based essentially on the concept of subjective right which is obviously metaphysical in character. It is, moreover, an imperialist or regalian system. It implies that the rulers have control of the power to command the *imperium* of the nation organised as a state.

The men of the Revolution did not doubt that

when they formulated this theory they were laying down eternal principles. It seemed obvious to them that the legislators and jurists of all times and countries would have no other task than the deduction of their logical consequences and the control of their practical application. The result has been very different. Scarcely a century has elapsed before the disintegration of the system is apparent to every one. Its two basic ideas, the sovereignty of the state and the natural right of the individual, are already dead. We see now that both of them are merely abstract conceptions useless for any juristic system that is to be truly scientific. It has long been clear that divine delegation does not explain the right of sovereign power. National delegation is no more satisfactory. The national will is the merest fiction.[3] In reality, all that we have is the will of some individuals and that will, even if it be unanimous, is still only the will of a sum of individuals, that is to say, an individual will with no right to impose itself on any one who resists it. So it becomes clear that Rousseau's Social Contract, even if it has been the Bible of several generations, and has inspired the Revolution, is still, with much splendour of style, only a tissue of sophistry. It is clear, too, that man cannot have natural rights in his individual person simply because by nature he is a social being. Man as an individual is a mere creation of the intellect. The very idea of

[3] [See, per contra, Bosanquet, The Philosophical Theory of the State (London, 1909), chap. v.]

right implies the idea of social life. If, then, man has rights, he can have them only from his social environment, he cannot impose his rights upon it.[4]

We have witnessed in the last half of the nineteenth century an immense economic change. The rigid and abstract system of law constructed by the Revolution can no longer be harmonised with that change. The economists have shown us how in every domain of human activity a national economy has been substituted for a domestic economy. The family can no longer satisfy human needs. A vast organisation, of national extent, based upon the concurrent endeavors of large masses of men, is alone adequate to that purpose. Nor is that all. Scientific discovery and individual progress on the one hand, the complexity of human relations and the interdependence of social life on the other, are to-day so vital that the very fact that some men are wanting in energy affects the whole system. Above all, our most basic needs, our postal system, railway transportation, our system of lighting are satisfied by organizations of such economic complexity that a moment's difficulty in their operation threatens the foundations of social existence. That is why the function of the state is widening so greatly. To organize war, police and justice is no longer adequate. The state must see to it that a whole series of industrial functions are in organised

[4] [See this forcibly put, though with somewhat different conclusions, in Mr. F. H. Bradley's famous essay, My Station and Its Duties, in his Ethical Studies.]

operation. It must prevent their interruption for a single moment. Such is the obligation imposed upon the ruling class by the conscience of our age. Clearly enough, it is incompatible with the idea of sovereignty. War, police, justice—these are the functions that harmonise with such a conception; they are indeed its direct manifestation. But the case is different with industrial service. The first need with the latter is not any longer the power to command; rather is it the obligation in a practical fashion to supply needs. We recognise that the governing classes still retain power; but they retain power today not by virtue of the rights they possess but of the duties they must perform. Their power therefore is limited by the degree in which those duties are fulfilled. The functions they have to achieve form, in their totality, the business of government.

The present evolution, then, may be summarised as follows: The ruling class has no subjective sovereignty. It has a power which it exerts in return for the organization of those public services which are consistently to respond to the public need. Its acts have neither force nor legal value save as they contribute to this end.

Constitutional law is no longer a mass of rulers applying to superior and subordinate, to a power that can command and a subject that must obey. All wills are individual wills; all are of equal validity; there is no hierarchy of wills. The measure of their difference is determined by the end they pursue. The will

of a statesman has no special force in itself; its validity is derived from its relation to the public service. It is, moreover, a relation that permits of degrees.

So it is that the idea of public service replaces the idea of sovereignty. The state is no longer a sovereign power issuing its commands. It is a group of individuals who must use the force they possess to supply the public need. The idea of public service lies at the very base of the theory of the modern state. No other notion takes its root so profoundly in the facts of social life.

CHAPTER I

THE ECLIPSE OF SOVEREIGNTY

WE have first to discuss the causes that have contributed to the disintegration of the theory of sovereignty. As in the case of every important social problem, they are as numerous as they are complex. Some are both anterior to the creation of the imperialist system and inherent in it; others are external and hinge on philosophical, political, and economic considerations. Indeed, every legal theory is the product of these three factors.

I

The idea of sovereignty, as we find it in the *Contrat Social* and the constitutions of the Revolutionary period, was the product of a long historic evolution; yet the conditions under which it was formed gave to it a somewhat artificial and precarious character. It ought therefore to disappear at that point in social evolution when subjects demand from their rulers something more than the services of defense, of police, and justice.

Like most legal institutions under which European

civilization has developed, sovereignty goes back in its origin to Roman law. During the feudal period it was almost completely eclipsed. Its reappearance is a modern phenomenon. It was the action of lawyers who mingled royal power with the Roman *imperium* and feudal lordship to make the sovereign power of modern law. In the 16th century Bodin outlined its theory; he made of sovereignty a personal possession of the king. In 1789 the nation dispossessed him. Law found the legitimacy of its act in the doubtful philosophy of the *Contrat Social.*

A legal theory of sovereignty dates only from the beginning of the Roman Empire. It was the possession of the people as a whole. Capable of being delegated to a single man it was confided to the princeps by the *lex regia.*[1] It was thus possible for the emperor to concentrate in his person all those powers the Republic had divided between the different magistracies. The imperial power was founded on a twofold authority; on the one hand the proconsular impression derived from the system of prorogation, and on the other the tribunitian power derived from plebeian constitutions. The emperor obtained the *imperium* either from the Senate or from the Army. The people, by the *lex regia,* transferred to him the tribunitian power.

In the course of a natural evolution the emperor came to possess both the *imperium* and the *postestas,*

[1] *Cf.* Ulpian, L. i. Dig. De Const., prin. 1, 4.

as a right to command inherent in his position. It was no longer a right exercised by popular delegation; it had become a right inherent in his character. The development is achieved at the end of the third century under Diocletian and Constantine. If in the sixth century the Institutes of Justinian still speak of the *lex regia* it is as a piece of antiquarianism, a phrase copied literally from a text of Ulpian. The fact was that the Roman Emperor equaled his will with law. *Quod principi placuit legis habet vigorem* is a maxim derived from the fact that the emperor now possesses full sovereignty, can, that is to say, impose his will on others as his right, just because it is his will, just because it therein possesses a quality entitling it to general obedience. So the genius of Rome created a legal theory of public power —later to be called sovereignty—which was to remain until the twentieth century the basis of public law in Europe and America.

II

During the feudal period this theory of the *imperium* was almost eclipsed. When the Western Empire was overwhelmed by the barbarian invasions the ephemeral effort of Charles the Great did not prevent European society from organizing itself in a régime of contract. The various social classes were co-ordinated in a scheme which agreement made hierarchical. Duties and rights were reciprocally im-

posed. The feudal lord was not a prince who commanded by virtue of his *imperium*. He was a party to a contract, demanding the fulfilment of promised services in return for the fulfilment of his own promises. In the texts of the period we do not find the word *imperium*. Rather is the current phrase *concordia,* that which unites men, be they strong or weak, by a series of reciprocal rights and duties.[2] Despite the violence and conflict of which the middle age is so full, contract is the basis of the social structure. Yet the notion of *imperium* did not entirely disappear. In Germany it was maintained for the emperor's benefit; in France it was retained to the royal profit. Even in the feudal world the king remained the great dispenser of justice. At the very moment when the Capetian monarchy was no more than a shadow, men did not forget that the king "is charged to obtain peace by justice." "It was not merely the Church," M. Luchaire has rightly pointed out, "which above all made the crown the fountain of justice. The lay feudality itself recognised that the whole purpose of the royal office was justice and peace. The oath taken by Philip I and his successors at their coronation bound them to give to each the justice that was his due, to do right to all, and to give to the people satisfaction for its legitimate claims." [3]

[2] *Cf.* E. Bourgeois, Le Capitulaire de Kiersy-sur-Oise, p. 320.

[3] Luchaire, Histoire des Institutions Monarchiques de la France, I, 40. Fliche, La Règne de Philippe I, 1912.

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III

The duty and power inherent in the crown to assure to all peace by means of justice are the principal elements in the reconstitution of the *imperium*. By a skillful combination of Roman memory and feudal institutions the royal lawyers rebuilt for the King of France what the emperor himself had formerly possessed. It was the king, so they taught, as an individual, who possessed the *imperium;* it was his property and the legal interpretation of the royal *imperium* derives from the idea of individual ownership. Just as an owner has an absolute right over his goods, so, in the same sense, is the royal *imperium* an absolute right; just as an owner can dispose of his goods in whole or in part, can give rights over them, can split up his right of property, can transmit it to his heirs, in the same way the king can alienate his *imperium* in whole or in part, can split it up or transmit it after his death. So was formed the patrimonial conception of the state—a conception so dominant at one time in Europe as to leave profound traces in later law. Two causes of very different kinds have concurred in its origin.

On the one hand, the persistence of Roman theories among the royal lawyers was important. Since their position was derived from the king's efforts to find a legal basis for his power, the lawyers believed that they could not better co-operate in that task than by making that power the equivalent of the Roman

dominium. Feudal law in the second place, under the empire of very complex circumstances, established a close relation between power and landed property. There is power only where there is landed property and its possession similarly implies a certain power. Of course, as I have pointed out, even at the height of the feudal régime the king was recognized to have a power so personal as to be independent of his land. But the feudal conception had spread too widely not to influence even the notion of kingship. Kingship indeed was more than suzerainty; but the power of kingship was regarded above all as a right of suzerainty and logically therefore, as a property-right.

When the feudal theory was combined with the memory of Roman ideas of *dominium* the outlines of the new system were already clear. The power to command is a right analogous to that of property. The king, as a person, is the possessor of that right. In modern terms it is a subjective right; a king, in his person, is its subject and after the model of private inheritance he transmits his possession to his heirs.

IV

From these materials the lawyers of the ancient régime built up a precise and complex theory. I cannot here discuss it in detail; but it will not be useless in explaining how the modern theory of sovereignty is derived from the ancient régime, to cite

some characteristic passages from the three jurists who have most clearly expounded the principles at the root of public law during the monarchy.

Loyseau, for example, writing at the beginning of the seventeenth century, described the king as follows:[4] "The king is above all a functionary with the full control of all public power . . . and above all a lord with full ownership of public power. . . . Also for long the kings of France have had sovereign power by prescriptive right of property." In the Treatise of Lordship,[5] Loyseau takes up in detail the same idea: "Lordship in its broadest sense is defined as proprietary power . . . power in common both to public office and to lordship; property distinguishes lordship from office, for the power of office is derived from its exercise and not like that of lordship from the simple fact of property." Loyseau then divides lordship into public and private types.[6] "Public lordship is so called because it concerns and deals with the right to command public power and can only be exercised by a public person . . . public lordship is called in Latin *imperium, potestas, dominatio, seigneurie.*" So if *imperium* is a lordship it is a property and by definition therefore every lordship is a property. It is perhaps worth noting that Loyseau himself draws a distinction between prop-

[4] Traité des Offices, Bk. II, chap. ii, Nos. 21 and 28 (ed. of 1640, pp. 187-8).

[5] Traité des Seigneuries, chap. i, No. 5 (Paris, 1640, p. 6).

[6] *Ibid.*

erty in public and property in private power, between public lordship and private lordship: "He who is submitted to private lordship is a slave; he who is submitted to public lordship is a subject."

This theory is summarized by Domat in a concise and vigorous sentence,[7] "The head and centre of the king's authority in the state and the starting point of its expansion through the body politic is his own person."

This power, a patrimonial right personally possessed by the king, has been called sovereignty since the end of the sixteenth century.

In its origin sovereignty was not the power of the king, it was only a special character attached to certain lordships and notably to royal lordships. The two Latin words from which the term sovereignty seems to be derived, *superanus* and *supremitas,* describe the owner of a lordship who is independent of any other lordship or, as medieval lawyers phrase it, whose lordship depends only on God. Sovereignty in this sense is found quite clearly in Beaumanoir. For here it describes certain feudal lordships. In the internal affairs of his barony, the lord recognizes no suzerain, for "each baron is sovereign in his barony."[8] But the character of sovereign belongs above all to the king: "for the king is sovereign and

[7] Le Droit Public, tit. iv, sec. 1, No. 3 (ed. of 1713, p. 21).

[8] La Coutume de Beauvoisis, chap. xxiv, sec. 41 (ed. of 1842, 11, 22).

has the right of general control over the kingdom." [9] From the beginning of the second half of the eleventh century the term sovereign is applied exclusively to the king; and in the sixteenth century Pasquier could write: [10] "the word sovereign is usually applied to all who are the first dignitaries of France but not absolutely, and with the lapse of time it has become attached to the first of those dignitaries, that is to say, to the king."

It was not long, by a phenomenon of frequent occurrence in linguistic history, that the word sovereignty, originally attached simply to a single character of the royal person, came to mean the royal power itself. It was Bodin who first used the word in this sense and thus began, at least in part, the endless controversies we have inherited. He defined sovereignty as "the absolute and perpetual power in the state." Then he analyzes what he calls the characteristics of sovereignty. The first and most essential [11] is "to command all in general and each in particular and that without the consent of its superior, equal or inferior." It is clear, therefore, that to Bodin sovereignty is simply the power of the king and that is the meaning of the term in later history. Loyseau himself, who for the most part regards sovereignty only as a quality inherent in certain lord-

[9] *Ibid,* chap. lxi, sec. 72 (11, 40, 7).

[10] Recherches sur la France, Bk. VIII, ch. xix (ed. of 1723, 1, 795).

[11] Les Six Livres de la République, Bk. I, ch. vii and xi.

ships, sometimes uses the word to designate the royal power;[12] and Leyret, who first used sovereignty in its original and feudal sense, soon came to abandon it and adopt Bodin's view that it was the totality of power exerted by the king.[13]

In the seventeenth and eighteenth centuries, therefore, sovereignty means a right to command placed in the king's hands. It is a right of the same kind as the right of property. The king exerts it just as he exerts his patrimonial rights. Sovereignty is a property; but it is so unified that it cannot either be divided or alienated. Like every proprietary right, it is, with the exception of certain restrictions derived from the nature of things, an absolute right. So the edict of 1770 asserts that the pretended fundamental laws cannot restrict sovereignty. It is manifested above all in statutes which are the expression of the sovereign will of the king.

V

Such are the origins of the idea of national sovereignty. It becomes one and indivisible, inalienable, and imprescriptible. Formulated in law, it expresses the national will. So at least we have been taught by the declarations and constitutions of the Revolutionary period. These formulas are as arti-

[12] Traité des Seigneuries, chap. ii, Nos. 4–9 (ed. of 1640, pp. 14-15).

[13] De la Souveraineté du roi, Bk. I, ch. ii (ed. of 1642, p. 5).

ficial as the ideas they express; or, rather, this conception of sovereignty, as the subjective right of a person, was an historical product which was to disappear with the circumstances which gave it birth. Yet it did not.

Every one knows the teaching of Locke, of Mably, of Rousseau and of Montesquieu. Every one knows the influence and prestige in France of the American Constitution. Full of admiration for its teaching, the Constituent Assembly was yet deeply impregnated with the monarchical conception. It was fortunately discovered that by a simple verbal change the monarchical theory of sovereignty could be easily reconciled with the teaching of the philosophers and the principles of the American Constitution. All that was necessary was to substitute the nation for the king. The king was a person, a subject of right, the holder of sovereign power; like him, the nation will be a person, a subject of right, the holder of sovereign power. The sovereignty of the king was one and indivisible, inalienable and imprescriptible; nor will national sovereignty be here different. The Declaration of Rights and the Constitution of 1791 say categorically that "the source of all sovereignty resides fundamentally in the nation. . . . Sovereignty is one and indivisible, inalienable and imprescriptible. It belongs to the nation." [14] For very different reasons, it is true, but with significant results, that same theory could be discovered in the

[14] Art. 3 of Constitution of 1791, tit. iii, art. 1.

principles of the ancient régime and the political doctrines of Rousseau.

So the two currents met. When the political philosophy of the eighteenth century arrived at conclusions identical with those of monarchical theory, they could not but impose themselves on the legislators of the Revolution. For if the latter were monarchists by tradition and temper, experience and sentiment had made of them philosophers.

VI

So may be defined the basis of public law inherited from the Revolution. The nation, as a person, possesses a subjective right in that power to command which we call sovereignty. The state is the organized nation; it is thence that its sovereignty is derived; and public law (the Staatsrecht of the Germans) is the right of the state which consists of the mass of rulers by which its sovereign personality is made manifest. It is these rules that determine its interior organization, and regulate its relation to other personalities; where those personalities are within its territory they are subordinate to it; where the personality in question is that of another state it has equal validity with its own.[15]

It is clear that if the historical origin of this conception is as I have described it, the notion of sov-

[15] [See this view defended in Esmein, Eléments de Droit Constitutionnel, 5th ed., Introduction.]

ereignty must disappear when the circumstances that produced it are no longer effective. The personality of the nation, which is its basis, was sanctioned by the law of the Revolution only to conciliate a living monarchical tradition with the principles of a political philosophy which at that time received the enthusiastic adherence of all thinkers. The monarchical tradition is almost dead and its supporters cannot revive it. A new philosophy, more fitted to our needs, is being elaborated. With its emergence the conception of sovereignty outlined above can hardly long survive.

Nevertheless, it has persisted beyond expectation under the ægis of causes which can only be described as quasi-religious in character. In his famous work on the Revolution, de Tocqueville called one chapter "How the Revolution, though political, evolved a religious Revolution: The causes of this phenomenon." [16] "Because," he says, "it seemed to tend rather to the regeneration of the human race than to the mere reform of France, it awakened a passion more violent than the greatest political revolution had thus far been able to produce. . . . As a consequence it became a kind of new religion, imperfect indeed, without a God, without dogma, and with no independent life. Nevertheless, like Islam, it flung its soldiers, its apostles and its martyrs over the face of the world." The basic dogma of the Revolutionary religion was the principle of national sovereignty.

[16] Chapter III.

It was because it was accepted as a new faith, that it was able, even though the product of a peculiar historical environment, not merely to obtain acceptance but even to survive the circumstances that produced it.

It is of course true that all great social and political movements have in some degree a religious and a mythical character. In each of them is to be found as the secret of its grandeur and its strength some myth to which the conscience of a people of a race, even of an epoch, has passionately clung. Such myths seem to act as principles of action and sources of energy. They clothe in concrete form an abstract ideal. They give to that idea a superhuman and mysterious quality which inflames the imagination of the crowd, above all at those times when man's perennial need of faith seems deepest. Sovel has rightly said that the myth of Christ's divinity struck a death blow at paganism. In our own day a noble spirit like Peguy could see in the Dreyfus case the myth which might regenerate the modern world.[17] Sorel has preached with the same purpose the myth of a general strike. These are no more than the dreams of generous thinkers. But the myth of national sovereignty is of a very different calibre. It awakens the enthusiasm of men. It overturned the foundations of the old monarchical Europe. It inspired every political constitution of which the modern world gives evidence. Its influence has even

[17] Notre Jeunesse (1910).

been felt in that closed and unchanging world which was the Chinese Empire.

But a belief in a myth is by its very definition the belief in something that is contrary to fact. Inevitably sooner or later its creative fecundity is exhausted; reality claims its kingdom. In our own time, with the growth of the critical spirit, with the obvious weakening of religious faith, myths, if they can still be formed, have yet but a short term of life. The mythical character, nevertheless, of national sovereignty has given to it, even in its untruth, an active power for longer than it could otherwise have possessed. But its creative virtue as a principle of action and of progress is passing away. It is in too evident contradiction with definite facts. It is powerless to protect us against those who hold political power. It cannot secure from the governing class the necessary assurance that the organisation and operation of public services will be adequately performed.

VII

With some rare exceptions there was no class or party in the nineteenth century which did not accept national sovereignty as a religious dogma. It is indeed true that those who drew up the preamble of the Charter of 1814 affirmed the permanence of the monarchical principle and divine right; but that was a platonic concession to the wishes of Louis XVIII and it deceived no one; 1830 was the re-statement of

the principle of national sovereignty. The doctrinaires of course criticised with vigorous penetration the fruitless artificiality of this conception of sovereignty;[18] but its criticisms had no practical result. We ought yet to cite a passage from a speech of Royer Collard delivered in 1831, when the proposed Peerage Bill was under discussion: "The majority of individuals," he said, "the majority of wills, cannot be sovereign. If they are sovereign let us frankly admit that the sovereignty of the people is only the sovereignty of force, the most absolute form of absolute power. But societies are not merely numerical collections of men and wills. They are not merely made up of numbers. They have a bond stronger than that; they have the privileged right of humanity, and the legitimate interests born of that right. . . . The will of one, the will of some, the will of all is only force less or more in its strength. We deny that any obedience, any respect is due to their wills merely because they are wills."[19] That courageous utterance found an echo either in Parliament or in the country. The Revolution of 1848 was made in the name of national sovereignty; and it was again in its name that the monarchies of Europe were overthrown. Universal and equal suffrage and the majority principle which is illogically deduced from it

[18] [*Cf.* Duguit, Law and the State, 31 Harv. L. Rev., chap. ix, and my Authority in the Modern State, ch. iv.]

[19] Archives Parlementaires, 2nd Series, Vol. 70, p. 360.

took deep root in France. From France it has spread over the whole world.

There has come a change. With the beginning of a new century the clear and decisive question is defined by asking what reality this principle of sovereignty possesses. It has been ably and boldly criticised. August Comte tilted in his powerful fashion against it. "In the thirty years of my philosophical career," he wrote, "I have always pictured the sovereignty of the people as an oppressive mystery, and equality has seemed to me an ignoble illusion." Since then the dogma has declined, and no one has more powerfully attacked it than the theorists of the *Action française* and those of revolutionary syndicalism.[20]

The former do not deny the existence of public power. They urge, however, that it does not belong and cannot belong to the nation, which, from its nature, is incapable of self-government. It can belong, as French tradition has long taught, only to a national king whose dynastic interest is at one with the interests of the country. From the positivist standpoint, Deherme has arrived at the same conclusion, though he substitutes a dictator for kingship. The syndicalist attacked the very principle of political power and, drawing their inspiration from Proudhon, urge that economic organization ought to replace and is replacing the idea of political organiza-

[20] [See this well discussed in D. Parodi, Traditionalisme et Démocratie.]

tion. I cannot here discuss these doctrines in detail; and that task is rendered the less necessary by the fine analysis of M. Guy-Grand.[21]

Of course these theoretical attacks would be fruitless if the normal theory of sovereignty could adapt itself to the facts of to-day. But everything goes to show that it is in flagrant contradiction with the social and political change that we are witnessing, and with the disappearance of its efficacy, it has become even harmful.

There are innumerable social and political facts with which the Revolutionary theory of sovereignty is incompatible. I will take only the most striking which group themselves under two heads: (1) National sovereignty implies an exact correspondence which in fact is often non-existent between state and nation; (2) national sovereignty is by definition one and indivisible; it implies the suppression in the national territory of all groups exercising independent control. It is however obvious that where there is decentralisation or federalism such groups maintain a vigorous existence.

That there is often no correspondence between state and nation can be immediately shown. Sometimes the same government controls several distinct groups each of which is undeniably a nation. Often enough these nations are even rivals and remain united only by their common subordination to superior power. Of such a condition the Austrian Em-

[21] Le Procès de la Démocratie (1909).

pire is a striking example. It is an agglomeration of nations each with a clear individuality of its own. No one can speak of an Austrian national will that is one and indivisible; no one can say that the Austrian state is the Austrian nation in its political aspect. The Czechs of Bohemia, the Germans of Austria, the Italians of the Trentino and Istria, the Poles of Galicia, the Serbs of Bosnia and Hertzegovina belong in reality to distinct nations. Where is there a collective will of which the nation is the subject? Nobody doubts that there is an English people, but it is not less certain that the Irish people are no part of it. The United Kingdom is of course a state; but it is not a single nation organised as a state. What we have is rather a government imposed on three distinct nations.

Again the power of government is exercised over a large number of individuals who, without forming an autonomous nation, do not favor part of that nation of which the state is principally composed. Every government exerts power over men who are not subject to it but merely found on its territory. The inhabitants of colonies are subject to the mother state without being members of its constituent nation. The inhabitants of the French colonies are subjects, without being citizens of the French state. There is thus a large number of persons subordinated to the French government without being members of the French nation. Such facts make impossible the ordinary theory of national sovereignty; but the very

basis of that theory implies that public power can be exacted only over the members of that nation which creates it.

VIII

Sovereignty being, like the national person which possesses it, one and indivisible, the same men and the same territory must be under unified control. Since the nation is a person and its will is sovereign political power, it concentrates in itself all right to command, and there cannot be on its territory any group which shares in its sovereignty. There are numerous texts of the Revolutionary period in which this principle is consecrated. It is sufficient to mention the first article of the preamble of the third clause of the Constitution of 1491, which has already been cited: "Sovereignty is unified, indivisible, inalienable and imprescriptible. It belongs to the nation and neither a part of the people nor an individual can claim its exercise." But this principle is inconsistent with two facts of increasing importance in the modern world—decentralisation and federalism.[22] To-day many countries with a unitary system of government, and particularly France, move in the direction of a large decentralization. Federalism is almost the common law in America. In Europe, Switzerland and the German Empire are already Federal states and the system is without doubt

[22] [*Cf.* my Problem of Sovereignty, Appendix.]

destined to expand. In the usual theory of sovereignty regional decentralisation, with which alone I am concerned at the moment, is a system in which certain local groups, varying in character and number according to the state in question, exercise certain prerogatives by means of organs and agents regarded as representatives of the local group; but their activity is more or less strictly controlled by the superior authority. The French Commune is a very clear example of a local and decentralised group. It holds real rights of sovereign character: it has a police power, it can levy taxes, it has the privilege of eminent domain. These powers are exercised by organs and agents as representatives of the commune. Whatever may be said, this is the flagrant contradiction to the conception of a unified and indivisible national personally exercised sovereign power. It has been skillfully suggested, in the effort to conciliate such a disharmony, that the national state voluntarily concedes a part of its sovereignty, that it determines how much it will concede and that it can always take it back; all of which is taken to mean that an indivisible sovereignty is thus implicitly reserved.[23] The fact, however, still remains that while the concession operates there is on the national territory a public person possessing certain sovereign powers which yet forms a part of the national person.

[23] [This is the strict juristic fact. *Cf.* the classic chapter on Non-Sovereign Law-making Bodies, in Prof. Dicey's Law of the Constitution.]

But this cannot be the case if sovereignty is one and indivisible. To avoid the disharmony, it has been urged that these decentralized groups are not really sovereign, that though they exercise sovereign power, sovereignty itself remains undividedly attached to the indivisible national person. This is the merest quibbling. In point of fact local groups *quâ* local groups cannot exercise sovereignty. The only persons who can are local agents, because they alone have a real will. It is therefore urged that the state remains completely sovereign, that the local agents are state agents and not representative of the local groups and there is no longer therefore any decentralisation in the current sense of the term.

As to federalism more even than regional decentralisation it negatives the idea of state sovereignty. It is essentially constituted upon the basis that there exists on the same territory only one nation but several states invested as such with sovereign power. Every federation is divided into a central and federal state which is the nation regarded as a state and local groups which, themselves states, constitute the federation.

Some thinkers are so hypnotised by the dogma of the sovereign personality of the nation-state that they do not even see this contradiction. M. Esmein declares that "in unitary states sovereignty is one. The federal state, on the other hand, although corresponding to a real national unity, divides its sovereignty. . . . Certain attributes of sovereignty are

taken by the constitution from the participating states and transferred to the federal state." [24] M. Esmein urges that this is natural. But the German and Swiss thinkers who are face to face with the problem which has a special practical meaning for them have had to make immense yet unfruitful efforts to resolve it.

Some, like Seydel, have urged that only the constituent states are states and that the German Empire is not an empire at all.[25] We can understand why a Bavarian lawyer should take this point of view, but to urge that the German Empire is not a state seems to go beyond the due limit of paradox. Other writers have suggested, on the contrary, that only the central state is really a state and that there is in law no difference between a decentralised area in a unitary country and a constituent state in a federal country.[26] This again is contrary to obvious facts; and even if it were true, it would explain nothing; but the difficulty would still remain that the mere fact of decentralisation is incompatible with state sovereignty.

Two great students of public law, Laband and Jellinek, have tried to solve the problem by saying that there can be and are non-sovereign states.[27] In this view the constituent states of a federation are

[24] Op. cit. (5th edition), p. 6.

[25] Seydel, Kommentar zur Verfassung-Kunde für das deutsche Reich (1st ed.), pp. 6, 23.

[26] Borel, Souveraineté et l'Etat Fédératif (1886).

[27] Laband, Droit Public, 1, 5f. Jellinek, Allgemeine Staatslehre (2nd ed.), p. 470f.

states but not sovereign because the central state alone possesses sovereignty. They try to show that sovereignty is not the whole of public power but only a certain quality of it. Despite their effort, the attempt is fruitless simply because neither Laband nor Jellinek explains the differences between a decentralised area and a constituent state in a federation. In any case the doctrine would explain nothing, because the real difficulty is to show how public powers, either in federalism or in decentralization, admit of division.

It is without result that Gierke in Germany [28] and Le Fur in France [29] have exhausted the resources of ingenious subtlety to explain the difference between the unitary and the federal state even while the sovereignty of the latter remains one and indivisible. In their view the federal state like the unitary state shows a correspondence between state-unity and national unity. There is only one state as there is only one nation; there is only one sovereign person—the nation organised as a federated state, but the federated state is itself a corporation of states; they combine to form the sovereign personality of the federal state. They are like the citizens in a unitary democratic state. They participate—and this is the typical trait—in the formation of a state-will. As a consequence they are related not merely to the exercise of sovereignty but to its very substance.

[28] Jahrbuch de Schmoller, VII, 1097.

[29] L'Etat Fédéral, p. 697f.

In truth, this is the merest dialectic without relation to reality. No one can define the substance of sovereignty. To equate the state in a federation to a citizen in a unified democratic state explains just nothing at all. Nor does this doctrine explain any better than the others how, if sovereignty is the indivisible will of the nation, local groups can possess some of its prerogatives.

We have dwelt on this problem because it is defined for the modern publicist as the root of all problems. Immense efforts have been made to solve it. They have only shown that there is an implacable disharmony between the concept of sovereignty and the facts of actual life.

IX

This insoluble antinomy is not the cause which has destroyed the idea of sovereignty. It might even have persisted despite everything if men had believed in its practical efficacy. The exact contrary is the case. The modern conscience clearly feels that what we demand from the state cannot find its judicial sanction in any system that is so derived.

A legal system is real only in the degree in which it creates and sanctions rules satisfying the needs of men in a given society at a definite moment of time. It is no more than the product of these needs; for if this is not the case, or if it does not secure the satisfaction of them, it is the artificial construction of a

law-giver and a jurist and so without validity or force. Any system of public law can be vital only so far as it is based on a given sanction to the following rules: First, the holders of power cannot do certain things; second, there are certain things they must do. Men feel to-day profoundly convinced that an imperialist system of public law can give no security that these rules can be established. They feel that because criticism has shown the decline of the doctrine. They understand its futility because actual facts have demonstrated that the theory of the sovereign state cannot protect the individual against despotism. It is of course true that when in 1789 the National Assembly proclaimed and defined the dogma of sovereignty, its main thought—it is its chief claim to fame—was to determine at once the basis and extent of the limits of sovereignty. Their answer was the Declaration of the Rights of Man. They postulated as an antithesis the sovereignty of the state and that autonomy of the individual will we call liberty. They affirmed that the right of the state is limited by the right of the individual and that the state can act only to protect only to the degree in which it does protect that liberty. But individual liberty must itself be limited; the most extreme individualists admit that only upon this condition the social life becomes possible. If, then, individual liberty limits the sovereignty of the state it can only be up to a certain degree, since it is itself limited. There thus arises a twofold question: In what degree is liberty to be

limited? What guarantee have we that this limitation will not be arbitrary? The answer, and it is the only possible answer, is that individual liberty can be limited only in the degree involved in the protection of general liberty. It is admitted that this limitation can be made only by the law, that is to say, by a general resolution voted by the nation or its representatives. (Declaration of the Rights of Man [1789], Articles 4 and 6.)

But these, as experience has shown, are the frailest of guarantees. That doctrine which postulates as fundamental the completest individualism has today but few adherents. Most men see in it only an abstract argument defended just as all such doctrines find their defenders, but not otherwise. That is only to say that it is a dead doctrine. Assuredly there is some guarantee in a law limiting individual liberty. Its very generality protects the individual against partisanship in government. But the men of 1791 believed law to be infallible because, to them, it was the very will of the nation. Experience, however, has shown that they were completely wrong. If a law is voted directly by the people, it is the work of a passionate, eager crowd possibly without relation to justice. It is true that Rousseau said [30] that "the sovereign being formed only of private citizens neither has nor can have interests opposed to theirs; as a consequence, sovereign power need not give guarantees to its subjects since it is impossible that a body should

[30] Social Contract, Bk. I, ch. vii.

desire to harm all of its members." To-day this reads as no more than a tragic sophistry.

There is no greater guarantee if the law is passed by an elected parliament. Parliament indeed has rightly affirmed that it represents the national will, but in fact law is the individual work of a few deputies. When universal suffrage was established in 1848 it was believed in good faith, but naïvely, that all was saved. The plebiscite of 1851 ratified the *coup d'état.*

The commissions, general surety laws, and briefly the whole despotism of the early years of the Second Empire, enlightened men's minds as to the guarantees to be expected from universal suffrage.

Indeed the conception of sovereignty has always been, both in theory and practice, an absolutist conception. At the beginning of the *Contrat Social* Rousseau declares that "it is against the nature of a body for the sovereign to impose a law he cannot enforce, so that there is not and cannot be any kind of binding public law; not even the social contract, on the body of the people." He justifies this proposition by a strange piece of sophistry.

"Whoever," said he,[31] "refuses to obey the general will may be constrained to do so by the whole people, which means nothing else than that he may be forced to be free." It was in the name of this doctrine that the Convention laid on France the burden of its cruel tyranny; and the two Napoleons did not hesitate to

[31] *Ibid*, Bk. I, ch. vii.

invoke popular right as the basis of their despotism. Those German jurists who like Gerber and Laband wished to make the imperial despotism into a legal theory use Rousseau and his false conception of sovereignty for a similar purpose.

That is not all. The ruling class to-day must not only abstain from certain things, but must perform other things. We therefore need a system of public law in which this positive obligation is enshrined. Now in this regard a system based on sovereignty is obviously by its very nature impossible. This was not obvious when the state provided no more than police, military and judicial services. Indeed, the holders of power must naturally take measures for the defence of the territory and to impose order and peace. In so acting they serve their own interests, since defence against external hostilities and the maintenance of order within are the very conditions under which they retain power.

From another point of view when governmental activity was limited to the performance of these services, their acts appeared as simply unilateral commands. The *imperium* of the Roman Emperor, the jurisdiction of the Roman magistrate made itself apparent above all as a right to command. The kings of France, who inherited the Roman tradition under a different name, inherited the same attributes. When, therefore, in 1789 and 1791 it was desired to determine and analyze the content of governmental activity, it seemed no more than the power to com-

mand; and upon that basis the theory of the three powers was constructed.

To-day as a result of a complex transformation, due, partly, to the progress of knowledge, and partly to economic and industrial change, the business of government has gone beyond the provision of justice and police and of defence against war. They are required to perform the most numerous and varied services, many of them of an industrial character. They are what the Germans call in their mass Kultur: government must perform the activities necessary to the development of the individual well-being, physical, intellectual and moral, and the material prosperity of the nation. The interest of government is no longer identical with that of its subjects. It is not opposed to it, but it is, definitely, distinct from it. The result is to create the need of such a system of public law as will implicitly sanction these obligations. But that need reveals the impotence of the imperial system.

It is true, of course, that in such a system the sovereignty of the state is limited by liberty. But to the individual, liberty is a right to develop without hindrance his physical, intellectual and moral capacities; it is not the right to demand the co-operation of others or of the state either in their development or accomplishment.

When, moreover, government performs these functions what is revealed is not command, the prerogative of a sovereign will, or the manifestation of the

traditional *imperium*. When the state provides public instruction, gives help to the poor, or assures transportation, it is difficult to relate these activities nearly or remotely to a power to command. Now, if the state by definition and by nature is a group which commands, that must always be its nature. If the state is not sovereign in one only of its activities it is never sovereign.

Yet in those great state services which increase every day—educational, the Poor law, public works, lighting, the postal, telegraph and telephone systems, the railways—the state intervenes, but it intervenes in a manner that has to be regulated and ordered by a system of public law. But this system can no longer be based on the theory of sovereignty. It is applied to acts where no trace of power to command is to be found. Of necessity a new system is being built, attached indeed by close bonds to the old but founded on an entirely new theory. Modern institutions, under the new and fruitful jurisprudence of the *Conseil d'Etat*, take their origin, not from the theory of sovereignty, but from the notion of public service.

CHAPTER II

PUBLIC SERVICE

THE idea of public service is to-day replacing the old theory of sovereignty as the basis of public law. It is not, of course, a new attitude. So soon as the distinction between rulers and subjects was established, the idea of public service was born. So soon as it was understood that certain duties were imposed on rulers from the fact of their power and that the justification and meaning of its exercise were therein to be discovered, the implications of the idea of public service were obvious. What is new is the important place that it to-day occupies in the field of law. Here, indeed, is the source of the profound change we have been witnessing. It is no longer an *à priori* formula. It has become the expression of our actual situation.

I

There is one source of information we must not neglect. The doctrines of the theorists and the affirmations of statesmen have a special significance. They do not, of course, yet suggest any general or precise standpoint, but their hesitations and denials

are sufficiently numerous to be significant. Everywhere statesmen are agreed that the theory of the state has entered a new phase. They claim still a right on the state's part to command, but they admit also that it has duties to perform. The theorists in their turn admit that sovereignty no longer occupies the most important place in public law. In the imperialist system it was essential to regard the state as a person, for, since public power was a right, a subject of that right was necessary. Now it is said that while the personality of the state can not be absolutely denied, its domain ought to be limited, that it is only sometimes a person, that it may on occasion have a dual personality, each distinct in its nature. Hesitations and contradictions of this sort show how critical is the transformation that we are witnessing.

It is needless to multiply citations. We may recall the speech of M. Clemenceau, then President of the Council, at the inauguration of the monument to Scheurer-Kestner. Recalling the part played by that great citizen in the Dreyfus case, M. Clemenceau spoke as follows: "The die was cast. Already the crowd instinctively turned to the partisans of Barabbas. And that should give us anxious pause. The idea of number, universal suffrage, seemed to fail us; yet is it not here the very foundation of democracy that we are questioning? Well! let us hasten to say that democracy is not a government by counting heads in the sense in which the partisans of authority interpret government . . . democracy must be the gov-

ernment of reason. . . . But if we expect from these temporary majorities the exercise of the power which was used by our ancient kings, all we shall have achieved is to change the source of tyranny." [1] A little time earlier M. Barthou expressed an analogous idea when he wrote: "It is necessary to live with the times and not to perpetuate in our customs the dogma of a sovereign and infallible state of which the civil servants are the resigned and dumb slaves." [2]

It is, moreover, clear that the urgent movement towards proportional representation reveals the same tendencies. This interpretation, of course, is not based either upon the unstable attitude of certain statesmen or the change of heart produced among some of them who are no longer in power. They are but the chance vagaries which any serious observer of social facts has the right to neglect. But no one can deny that there exists in France an intense belief in electoral reform which far-sighted statesmen of every party have quite clearly understood.[3] They perceive quite clearly that we cannot to-day be satisfied with the over simple notion of a sovereignty which expresses itself in an electoral majority. That is no longer the fundamental principle of public law. On the day (July 10, 1912) when by 339 votes to 217, the Chamber of Deputies adopted an electoral scheme of which the first article provided that depu-

[1] Journal officiel, 4 Feb., 1908.

[2] Quoted in L'Humanité, Feb. 1st, 1906.

[3] [*Cf.* Georges Lachapelle, L'Œuvre de Demain. Paris, 1917.]

ties should be elected by the system known as the *scrutin de liste,* with minority representation we reached an important stage in the evolution of public law. It was not only the desire to establish a better electoral régime, to remove, so far as possible, the influence of corruption and to support the administration against political intrigue. What, above all, it meant was the recognition by the French Chamber that majority rule is no longer the fundamental principle of modern democracy; that the idea of national sovereignty, so intimately connected with it, is no longer the basis of the theory of the state.

II

If the belief of statesmen in the dogma of sovereignty has been thus profoundly shaken, that of the jurists is not less so. One only remains unmoved amidst the ruins of an ancient system. In the numerous editions of his book on Constitutional Law M. Esmein writes with always the same calm and strong certainty:[4] "The state is the legal personification of the nation, . . . it is the subject and the basis of public authority. The basis of public law is found in yielding to a sovereignty outside and above those who exercise it at any given moment an abstract and an ideal subject which personifies the whole nation. This person is the state. Its essential quality is its relation to sovereignty."

[4] Droit Constitutionnel, 5th ed., pp. 1-2. [The words remain unchanged in the sixth edition.]

The same doctrine is accepted by many German theorists and notably in the writings of Laband. What M. Esmein calls sovereignty, however, they call public power and they reserve the former term for certain characteristics of the latter. With these subtle distinctions we have no concern. The doctrine, with both, is fundamentally the same. But while M. Esmein accepts it as a result of observations that are as certainly inaccurate as they are undoubtedly conscientious and impartial, the attitude of most German jurists is derived from their desire to give at least the appearance of legality to the imperial autocracy.[5]

French publicists have clearly perceived the direction of this change even while they have hardly dared to admit it to themselves. They retain the notion of sovereignty but under the pressure of facts they reduce it to a nullity. Sometimes while they deny the personality of the state they desire to maintain the idea of sovereignty, which, thereby deprived of its necessary basis, becomes almost ethereal. I cannot attempt here to summarise these doctrines. I can only point out in a few words how two writers who are admittedly among the most representative of French publicists are led to the denial of sovereignty.

So long ago as the sixth edition of his *Précis de*

[5] Laband, Droit Public, above all, Vol. I. [See this well brought out in Joseph Berthélemy: Les Institutions Politiques de l'Allemagne Contemporaine, 1915.]

Droit administratif (1909), M. Hauriou has written that "sovereignty and law are no longer of primary importance since they do not any longer fundamentally determine the practical interaction of forces." On page 235 of his *Principes de Droit Public* (1910) M. Hauriou said "These theoretical reserves (the theoretical limitation of sovereignty) do not make it impossible for us to attack at its root the belief in the absolute power of the general will. Few false doctrines have had so evil an influence as that doctrine." This is surely the formal condemnation of traditional belief, but the basic notion of a new system, as M. Hauriou states it, is even more striking. He admits that there is a power to command, but he does not make that power a subjective right; he does not create a juristic person as the subject of that pretended right. What he does see is an actual power to compel. "The whole social organisation of a country," writes M. Hauriou,[6] "economic no less than political, derives from a mass of established situations kept constant by this power to compel. . . . The real function of this power is to create and to protect certain states of fact. It is too often regarded as a simple form of command and constraint without due attention being given to purpose. . . . The real function of power is to create order and stability. . . . This function it fulfils with more or less success. Power is legitimate when the fulfilment is adequate."

[6] Principes de Droit Public, 1910, pp. 78-9.

These quotations make clear the essential drift of M. Hauriou's thought. Clearly, for him, sovereign power is no longer the essential element in public law. The personality of the state is restricted in its domain to a kind of juristic effort at arrangement. Doubtless the power to compel continues to exist; but it continues to exist not so much as a subjective right inherent in the state as a social function. This social function is the very basis of the idea of public service; so that M. Hauriou practically recognises that public service is the only adequate foundation for a modern system of politics.

The same tendency is clear in the work of M. Berthélemy. Like M. Hauriou, he makes the personality of the state exclusively patrimonial in character. He does not deny the existence of public power; but again public power is not, for him, a subjective right. "Governmental acts," he says,[7] "do not imply the existence of a juristic person in whose name they are performed. . . . The idea of personality is indispensable only when we try to present the state as a subject of rights. Persons only have rights; the use of power is in no sense the exercise of rights. A civil servant who gives an order does not exercise a sovereign right. What he does is to fulfil his functions and then, if you will, the ensemble of such functions may be said to constitute sovereign power."

I cannot here enquire whether M. Berthélemy is consistent when, after having said that what is com-

[7] Droit Administratif (7th ed.), pp. 41-2.

monly called power or sovereignty is simply a function of the organs that build up the state, he distinguishes between functions based on the right to command and functions in which commands are merely obeyed. The distinction has given rise to immense controversy with which I shall deal later. But it is important to remember that both these thinkers insist that sovereign power is a function and not a subjective right to command. Both therefore eliminate from public law the subjective right of power and base it simply and solely on the idea of a social function the rulers must fulfil.

This idea of a social function which both statesmen and political theorists are beginning to place, as they begin to perceive it, at the very root of public law is no more than the idea of public service. We must now define its elements.

III

These are in fact already clear. They consist essentially in the existence of a legal obligation of the rulers in a given country, that is to say of those in fact who possess power, to ensure without interruption the fulfilment of certain tasks. This idea, as we shall see, solves every problem by which we are to-day confronted in public law and thus is self-demonstrative; nor do we desire any other proof of its accuracy. But, for precision's sake, it is important to discuss (1) who are the rulers; (2) what is

the basis of the obligation which is imposed upon them; (3) what is the purpose of this obligation.

Who are the rulers? From what has already been said it is clear that in actual fact they are not the representatives of a sovereign and collective person called the nation. We no longer believe in the dogma of national sovereignty any more than in the dogma of divine right. The rulers are those who actually have the power of compulsion in their hands. Why and how do they possess it? These are questions which can receive no general answer. The fact of possession is the product of historical, economic, and social forces which vary in each country. Governmental organisation cannot evade the categories of space and time. But all these elements, however important, are not of primary significance. The broad fact remains that in any given country there is a man or a group of men who can impose on others material constraint. It therefore follows that power is not a right but simply an ability to act. Right could be assumed when we believe that it came from a divine investiture or from a delegation of a collective personality and as such had a will superior to individual wills. To-day, however, these religious and metaphysical beliefs have passed away. The power of governmental control is no longer a right but simply a power to act. If the right of government has passed away, its obligations remain. In every age the mass of men felt that the holders of power could not legitimately exact obedience save in

return for certain services and to the degree in which they perform those services. Times without number social classes have lost political power because they no longer rendered the social services which were the conditions of its existence.[8] This feeling, long dimly felt by men, is to-day everywhere understood. That is why we do not merely affirm it but rather search eagerly to determine, as the essential problem of the modern state, the legal basis of these obligations. It would of course be easy to postulate a moral obligation based on one or other of current ethical systems. But no ethical system escapes criticism. Any ethical solution is the result of a personal impression, what it is fashionable to call an intuition, and not from a rigidly scientific affirmation. The modern mind demands for its social problem clear solutions based upon the seasoned observation of facts. It is not moreover a merely moral obligation that is imposed on government; it is also a legal obligation which can be given a scientifically organised sanction. When this scientific sanction exists we have the right to assume that the legal obligation of government is a reality.

It is probable that when individualism was the current doctrine the right of the individual himself could give rise to a legal obligation on the part of government. To-day, however, individualism is seen to be not less precarious than any other ethical sys-

[8] [See this well put in Mr. Brooks Adams' Theory of Social Revolutions, 1913.]

tem since it is at bottom simply a metaphysical hypothesis. Nor can it give rise to any other than a negative obligation when our requirement is something positive. Rousseau, the high priest of individualism, realised this when he admitted that the right of the individual cannot limit the omnipotence of the general will. "It is contrary to the nature of the body politic," he said,[9] "for the sovereign to impose a law he cannot enforce." If, then, government is that which has the greatest power of constraint, can they be bound by laws so superior in efficacy as to impose upon them negative and positive obligations? ᵀ. their actions are thus limited do they still possess supreme power? Is it a contradiction in terms to speak of legal obligations imposed upon supreme power? German theorists would seem to accept this standpoint. Like Seydel,[10] they urge "that it is an undoubted truth that there is no right without sovereignty, above sovereignty, or coequal with it. Sovereignty makes law."

This is in no sense true. To the modern mind such a conclusion generates no more than protest. Since, at bottom, law is the creation of the human conscience it may be asserted that legal obligations are imposed on government simply because we are to-day determined that it shall not be otherwise. We may assert that fact because, as I shall show, we have spontaneously organised the institutions of the modern

[9] Social Contract, Bk. I, chap. vii.

[10] Grundzüge einer Allgemeine Staatslehre (1873), p. 14.

state simply to give a positive sanction to these obligations. Sociological jurisprudence has sought to determine the facts from which they are derived. Personally, it seems to me clear that its real basis is social interdependence.[11] That attitude doubtless is open to serious objections; the fact still remains that it is a conception which provides a suggestive solution to our problem. It is important, moreover, that this idea of governmental obligation should be so widespread. Law and the rule of law are derived from the profound belief of the mass of men, that a given rule is imperative, that a certain task must be accomplished. Law, in brief, is above everything the psychological creation of men determined by their material, intellectual, and moral needs. That does not affirm the existence of a social conscience distinct from individual consciences. So to affirm would be to enter upon a dangerous metaphysical adventure.

If it is certain that governmental power has very diverse causes, material, economic, moral, religious, it seems equally clear that it can only maintain itself in any durable fashion through the belief of its subjects that their rulers perform their functions. This is true whether the belief is accurate or not. Superstition and ignorance may well make a government seem profitable to its subjects when in fact it is not. There has been a vital element of political power and

[11] *Cf.* my L'Etat, Vol. I, p. 23f. Traité de Droit Constitutionnel, Vol. I, p. 14f.

public law which, it is worth noting, is quite outside the realm of the social contract. That theory suggested that men united by an agreement and gave up their natural isolation; so was born a sovereignty and collective will which constitutes government. The fact, on the contrary, is that we have to start with a social group. The distinction between rulers and subjects is spontaneously produced and the former's power is imposed on the latter to a degree which varies with the belief and its utility.

There exists then an intimate relation between the possession of power and the obligation to perform certain services. It is a relation so clearly understood and desired as in itself to provide a sufficient basis for the legal duties of government. All over the world to-day every ruler, emperor, king, president, minister, parliament, holds power not for his own but for his subjects' advantage, and the idea is so widespread that every statesman repeats it to nauseation even while in fact he tries to obtain the greatest advantage from his position.

IV

Public services are those activities that the government is bound to perform. What are the nature and extent of these functions? To this question, as I pointed out in 1911, no general answer is possible. "The content of public services is always varying

and in a state of flux. It is even difficult to define the general direction of such change. All that can be said is that with the development of civilisation the number of activities related to public need grows and as a consequence the number of public services grows also. That is logical enough. Indeed, civilisation itself is simply the growth of all kinds of needs that can be satisfied in the least time. As a consequence, governmental intervention becomes normally more frequent with the growth of civilisation simply because government alone can make civilisation a thing of meaning." [12]

I have observed above that the government must at every time perform three functions: (1) National defence; (2) the maintenance of internal security and order, and (3) justice. To-day these services are not enough. There are indeed some economists of the study antiquated enough to say that the state has no other function than defence, police and justice, and that all other activities must be left to individual arrangement which usually assures a satisfaction of all social needs. For such theories the facts are too strong; the modern attitude refuses to accept them. It has other demands, as, for example, a demand that the state no longer regard education as a private affair and, in the material field, that the state organise the work of charity.

The profound economic and industrial change that

[12] *Cf.* my Traité de Droit Constitutionnel, Vol. I, pp. 100-1.

has taken place over the world has created new governmental obligations.[13] The clear interdependence of peoples, the solidarity of economic interests, growing commercial relations, the circulation on all hands of intellectual ideas and scientific discoveries, impose on the state the duty of organizing such public services as will permanently assure international communication. So in the modern state the postal and telegraph system has become a public service of primary importance. That service, indeed, brings out clearly the legal nature of the obligation internally and internationally, that is imposed upon the modern state. It shows the solidarity of the rights and obligations by which nations are linked together.

Within each state, an economic transformation has occurred which may be briefly characterised by saying that in almost every field of activity a national economy has replaced a domestic economy. As a result, men of the same social group are made more dependent upon one another even for their daily and elementary needs. For these purposes the family group is hardly sufficient. Its external relations have become essential and the activity of those relations is too vital to admit of interruption. It has become the business of government to ensure their permanence.

Examples could be given to repletion. The time

[13] [For the history of this change in England *cf.* Dicey, Law and Public Opinion (2nd edition), especially the Introduction. For France *cf.* Weill, Histoire du Mouvement Social.]

has passed when each man was his own public carrier. To-day to whatever social class he belongs he looks for transportation, whether of himself or of his possessions, to groups charged with this service. Both our habits and our economic needs cannot suffer even the shortest suspension; and this makes plain every day the greater necessity of organizing transportation into a public service. In the great towns we need tramways and a public motor service; throughout the country we need railway service. Transportation, like the post office, tends to become international in character. Not only public lighting but also private have been similarly transformed. The peasant in the Hinterland of Auvergne and Brittany is no longer content with the little oil or wax candle by which his parents' home was lighted. The time is not far distant when every house will demand electric light. So soon as this becomes a primary need it will create a new subject of public service. The invention of white oil has caused an economic and industrial revolution which is only at its beginning; and the transportation of electric energy will certainly be governmentally organized in the near future. It is this that explains the great law of June 15, 1906, on the distribution of electric energy.

We need not insist on these economic considerations. What they show in brief is how law evolves under the empire above all of economic needs. I have shown how the theory of sovereignty suffered eclipse immediately it was understood that the duty

of the state was something more than defence and internal tranquillity. It is to-day clear that the policy of the state must be determined by its total environment. A public service, then, may be defined as follows: Any activity that has to be governmentally regulated and controlled because it is indispensable to the realisation and development of social solidarity is a public service so long as it is of such a nature that it cannot be assured save by governmental intervention.

Were there need of a formal criterion by which such service as needs to be publicly organized could be determined, I should suggest that it is to be found in the social disorder that results in the suspension even for a short time of that service. In October, 1910, for example, the French railway strike, partial and short-lived though it was, showed clearly that railroad transport has every element of a public service. Similarly, the English miners' strike of 1912, by the disaster that it might well have entailed, showed that the time is coming when the coal miners must be organised as a public service, and when Mr. Asquith persuaded parliament to impose upon the coal owners the duty of establishing a minimum wage he took the first step towards their transformation into a public service.

V

Such is the nature of the profound change that is taking place in public law. Public law is no longer

a mass of rules which, applied by a sovereign person with the right to command, determine its relations between the individuals and groups on a given territory as a sovereign dealing with its subjects. The modern theory of the state envisages a mass of rules which govern the organisation of public utilities and assure their regular and uninterrupted function.

The relations of sovereign to subject do not make their appearance. The one governmental rule is the governmental obligation to organize and control public services in such a fashion as to avoid all dislocation.

The basis of public law is therefore no longer command but organization. Public law has become objective just as private law is no longer based on individual right or the autonomy of a private will, but upon the idea of a social function imposed on every person. So government has in its turn a social function to fulfil.

The consequences of this conception are immediately clear. Their detailed examination will show that the formula I have suggested is not merely a theory but actually an induction from the facts. It follows that if governmental action is not the exercise of a right to power it has no special character. What quality it possesses, what effect it produces are derived from the end it has in view. This in its turn determines the nature of law. In all the imperialist system law is essentially the manifestation of sovereignty. It is above all a command formulated by

the sovereign and so imposed upon his subjects. That is no longer the case. Law is simply the formulation of a rule, the product of a group of social facts which government believes necessary, as a rule, under the pressure of public opinion, in order to give itself the greatest possible strength. Most laws are in reality passed to organize and operate public utilities. Law is thus above all a law of public service.

The importance of this theory is obvious. It sets the method in which law to-day functions in a clear light. Government is legally obliged to ensure the operation of public utilities. It issues for this purpose general rules called laws. Their character is derived from the end government sets before itself. The rulers themselves are inviolable. The private citizen can only use a public service as the law provides and government can do nothing which may prevent its legal operation. That is to say that public utilities are institutions of objective law.[14]

Administration thus takes its character from its relation to an end connected with a public utility. We must, of course, distinguish between administration property called and an act performed by a humble servant of that government. Both of them, however, have a character in common that is derived from the purpose by which they are determined. We need, therefore, make no distinction between the different kinds of administrative acts. Above all,

[14] *Cf.* Hauriou, Droit Administratif (5th ed.), p. 1f; and Principes de Droit Public (1910), p. 124f.

we need make no distinction between acts of administrative authority and those in which the humble official merely carries out his superior's will.

Public utilities have thus an objective character. The law which governs them is only the recognition and operation of a general governmental duty. All administrative acts have a similar character because they serve a similar and public end. In these formulæ the new system may be resumed. Government and its officials are no longer the masters of men imposing the sovereign will on their subjects. They are no longer the organs of a corporate person issuing its commands. They are simply the managers of the nation's business. It should thus be clear, contrary to the usual notion, that the growth and extension of state activity does not necessarily increase the government's power. Their business increases, their duties expand; but their right of control is extinct because no one any longer believes in it.

It is true that the organisation and functioning of public utilities is expensive. Government has an immense budget, and wealth is the main element in power. It is indubitable also that the growth and extension of state-functions increase simultaneously both taxation and the area of governmental control. It may be added that since, in a democracy, election is the source of power, and since the number of officials increases necessarily with the number of services, political considerations make their way in per-

nicious fashion into the realm of administration. If state intervention is regrettable under any system it is deadly in a democratic régime.

There is truth in all this, but it does not alter the fact. Day by day the intervention of the state grows greater. Theoretically it cannot increase the right of the government to power, for it has no such right. But it is difficult to deny that its power is in fact increased. On the other hand is the important fact that this increase of power is counterbalanced, if not outweighed, by the movement towards decentralisation which is becoming one of the main characteristics of governmental evolution.

To add to the functions of government is to bring some service under its control with the guarantee that it is to be operated without interruption. That, however, does not involve the immediate and direct subjection of its officials to government control. On the contrary, in many old and some new services there is coming more and more to be established a system of decentralisation under divers forms. In some cases the method has been that of local territorial decentralisation where the civil service has a regional attachment of a more or less rigid character. Sometimes it is patrimonial, as where a definite service is handed over to the management of an autonomous group of officials. Sometimes, again, there is a kind of administrative syndicalism in which the technical experts of the particular service have a certain right of direction. Finally, its operation may be entrusted

to a private citizen acting under government control.

Alongside this decentralization a movement, of a similar kind, which may be called the industrialisation of government activity has evolved. It acts, of course, only in those services which have an inherently industrial character, such as transportation, railways, and the post-office. Where, in France, the railways have been handed over to private companies, this involves also the concession of a special industrial organisation, and it is only by its maintenance that the companies can make their profits; for this concession is in reality the same thing as governmental control. Where the state itself manages the particular service, it tends necessarily to be organised simply upon an industrial basis. It is necessary at all costs to shield it from the poisonous influence of politics to prevent the disorganisation and the financial dishonesty which invariably result. It is clearly necessary that the great railway district should provide continuous service and when it is under government control that can only be achieved by administrative and financial autonomy.

It is in this direction that we have begun to travel with the law of July 13, 1911, the principle is clearly formulated in Article 41, § 1. "The system of lines which constitute the state railway system (the combination of the former state railways with the lines purchased in the West) together with all those that shall be added by future legislation shall be managed by a single administration under the authority

of the Minister of Public Works accounting to the state and endowed with civil personality." It will soon be necessary to give an organisation based on similar principles to the postal, telegraph and telephone system, and similarly with all public services of an industrial nature. In Article 33 *seq.* of the same law the department dealing with gunpowder and saltpetre has been industrialized to some extent. On June 26, 1910, the Chamber of Deputies heard with amazement the suggestion of M. Steeg, then a private member, "to give independence to the postal and telegraph service that it may be operated as a definite industry." [15]

In whatever manner the business of the state is managed its fundamental idea is thus clear: government must perform certain definite functions. As a consequence a public service is an institution of a rigorously objective order controlled by principles equally imposed on the government and its subjects.

VI

If all this is true, certain results clearly follow. The legislation and jurisprudence of such countries as are influenced by this movement ought to tend towards the organisation of a practical system which shall indirectly constrain government to transform such activities as relate to urgent public needs into

[15] *Cf.* Alcindor, Revue de Science et de Legislation Financière, July-Sept., 1910.

public services. The private citizen demands a guarantee that the service with which he is provided shall proceed accordingly to law. And it is exactly this evolution that is taking place in French legislation and jurisprudence. A whole juristic edifice, of which the large outlines are already clear, is being constructed towards this end. That surely is the best proof that our theories are no mere abstraction but the accurate expression of definite facts.

If any public need ought, as the legal conscience of a people believes, to be organised into a public service, and if government refuses to act towards that end, what legal appeal lies open to the private citizen? Undoubtedly, the idea still dominant in public law is that the real guarantee is to be found in the electoral and representative system existing to-day, in different degrees, in every civilised country in the world. Upon that, for the most part, the private citizen must depend.

But there are still strange illusions abroad as to the benefits of this system and the guarantees it can afford. Of course, this widespread belief is in itself a precious weapon in the hands of private citizens. The press can bring the strongest influence to bear on parliament; and if public opinion rather easily accepts the abstention of the legislator from action, on the other hand it is rare for government to remain inactive when its intervention is imperiously demanded.

But if, after all, the government will not intervene

when it seems clear that its indifference will cause serious dislocation, even for a short time, the private citizen is not entirely helpless. A new legal institution is in process of construction which, in accord with the usual terminology, we may call the responsibility of the state. Here, indeed, is the great fact of modern public law, a fact totally foreign to the imperialist theory of the state. The abstention of the state involves responsibility on its part to the citizens harmed thereby, even when the state abstains in its legislative capacity. If we merely note the capital importance of this change, it is not because a fuller discussion is not required.

Because a statute has been passed to organise a public service and secure its operation, it possesses no infallibility. It can be attacked simply because law is no longer the command of a sovereign will but the totality of measures taken in a general way to secure the continuity of a public service. That is why every country tends to organise means of defence against statutes. The details of these means I shall discuss in the next chapter.

But let us suppose that the law has been passed and the public service is in operation. Even when it functions according to statute, the private citizen, where its operation causes him damage, is not deprived of redress. The great development of public responsibility is here, as we shall see, thrown into its most striking relief.

If the public service either functions contrary to

statute, or is not put into operation where the law demands it, if, in brief, the law of service is violated, the responsibility of the state is called into play at the private citizen's demand, if, of course, he has been injured. Even when there is no proof of direct prejudice, the law still gives the private citizen the means of legal action. The importance of this is the clear light it throws upon the nature of public services. This action is important and entirely objective in character.

Take such a question as the following: has the private citizen the right to demand the operation of public services in accordance with statute? This question has been several times discussed before the Council of State by the representatives of the Department of Justice. In one of the first of these cases M. Romieu, then counsel for government, argued as follows:[16] "We must then enquire if users have any right to demand the intervention of the administration." So put, the question hardly brings out the real bearing of the problem or, at least, it is so put as to be susceptible of confusion. The question as to whether there exists any right by reason of which the private citizen can demand the operation of a public service according to law involves the question of the bond existing between the state and the private citizen in virtue of which he can compel it to perform the duties enjoined by statute. This he

[16] Affaire Croix de Seguey-Tivoli, Decision of Dec. 21, 1906, Sirey, p. 968.

clearly cannot do; and this inaccurate terminology explains the hesitation so clearly felt by the government representatives.

The facts are the strongest feature of the situation. Under their empire there is growing up a new rule of law and a new procedure as a result of which action may be made compulsory. The basis of the formation is as follows: the creation and organisation of a public service involves its due operation according to law. Should the administration act contrary to it, every private citizen can by means of an action have that act annulled. This is legal redress of a purely objective kind. That is to say that the private citizen does not and cannot ask that the state should be compelled to ensure the regular operation of the service; all he can ask is that the illegal administration be annulled.

No legal bond exists between the state and the private citizen which obliges the state to fulfil his demands, but a law, that is to say, a purely general regulation, controls the operation of the service and if the state violates that law its illegal act can be annulled. This is true whatever the service and however it is operated. There is no distinction between services directly connected with public authority and services in which the humble civil servants merely fulfil the command of their superiors. There is no distinction between a public service directly managed, decentralized or operated by delegation. The Council of State has hesitated and its formulas are not always

above criticism. But the facts have triumphed and the legal principle I have just described may be considered to-day as finally established.

We cannot here analyse in detail the jurisprudence of the Council of State upon this point. We can only note that it is, above all other methods, that which is coming to control the evolution of public law. Any realistic study, certainly, must be based upon it; otherwise the solution proposed is merely formal and biased by its artificial preconceptions. The statement of its most characteristic decisions may serve to make this clear.

The first three related to somewhat peculiar circumstances. A public transportation system was operated by delegation to a company.[17] The question involved was whether the public may sue on the ground of *ultra vires* for acts by which the controlling authority refuses to exercise his power or violates the law involved. If he can so sue, clearly, the private citizen has always a legal means of preventing violation of statute even when the act of violation is that of the civil servant in control. Not without hesitation, the Council of State, in the three cases concerned, admitted that the plea can be received. On February 4, 1906, they heard the plea of the residents of the Rue Quatre-Septembre against a decree issued by the Prefect of the Seine on August 25, 1902, which,

[17] By the law of June 11, 1880, Articles 21 and 39, the French tramway services, however managed, are under the strict control of the prefects as government representatives.

contrary to the law, authorized the East Paris Railway Company to erect an overhead railway over the surface of the Opera-Place de la République. The plea was admitted.[18]

In the next year the Council went a step further. In the earlier cases the plaintiffs had attacked a spontaneous and positive act of the administrative authority. In the case of the *Syndicat Croix de Seguey-Tivoli,* they attacked the refusal of a prefect to prevent, at their request, and conformably to his duties, a tramway company from giving up a car service which, it was claimed, would have been suppressed contrary to the conditions of the company's charter. The Council of State admitted the plea.[19]

In 1907 it admitted the plea of an officer, long dismissed, against a decision of the Minister for War. The latter had refused to compel the Western Railway Company to give the officer a ticket at the reduced price which article 54 of its bye-laws demands. He claimed that this was illegal; and the remarkable conclusions of M. Teissier urged that any person whose interests are thereby adversely affected may attack an administrative act which is contrary to the charter of a railway company. That charter, the decision holds, is part of its organic law.[20]

[18] Conseil d'Etat, Feb. 4, 1805. Recueil, p. 116.

[19] Council of State, Dec. 21, 1906. Recueil, p. 961; Sirey, 1907, iii, 33.

[20] Conseil d'Etat, Nov. 15, 1907. Recueil, 1907, p. 820. Revue de Droit Public, 1909, p. 48.

VII

Private citizens can thus use legal means to obtain the regular operation of public services even under private direction. But the same rule holds also where they are directly exploited by the state, or its diverse administrative organs. If the state had remained a power which issued sovereign commands, it would be impossible to understand how a private citizen could demand from a sovereign power the intervention necessary to secure the organization of public services and their regular operation. But if modern law organizes guarantees on behalf of the private citizen against the state itself, if every one whose interests are concerned has means of legal redress against every illegal act on the part of the state, it is clear that public law is now based on a rule of conduct which compels government to fulfil the obligations implied in public service.[21]

This objective admission of legal recourse against the state where the action of the latter is illegal grew up under conditions of great interest in relation to elementary education. It may be true that educational neutrality is a chimera impossible of realization. It is not, however, doubtful that the idea of neutrality is in virtue of the great laws of March 28, 1882, and Oct. 30, 1886, the essential principle on

[21] [The reader ought to note that M. Duguit throughout uses state as identical with government, on the ground that its power is, for practical purposes, exerted by the latter. On the justification of this *cf.* Laski, Authority in the Modern State, chap. i.]

the organization of elementary instruction. How can a private citizen compel the authorities to give his children an education strictly in conformity with the principle of neutrality? It is of course obvious that if the violation of law is a personal fault of the teacher, the father of the child can make the former responsible. This was definitely established by the Tribunal of Conflicts (June 7, 1908) in the Morizot case. But the circumstances are rarely so clear. The usual situation is for the principle of neutrality to be violated without fault being ascribed to any civil servant. When, for example, the father complains that the principle of neutrality is violated by reasons of the University administration giving the students books with a definite tendency either towards actual infidelity or at least of an anti-Catholic nature, if the fact is true, the law of neutrality is obviously violated without there being any personal fault, in the legal sense, committed.

What is the parent then to do? Can he obtain annulment of this violation? There is no doubt on that head. The question has been brought before the Council of State and its decision conforms to the general direction of this jurisprudence.

The question came up as a result of the demand of some parents that certain academic decisions should be annulled. It was claimed that pupils had been expelled because they refused to use the text book that was regularly used in the school. The plaintiffs

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claimed that the expulsion was wrongly inflicted because the children had refused to use the text books by their parents' orders, since the text books hurting Catholic feelings violated educational neutrality. In six cases the Council of State rejected the plea on the ground that the legal regulations clearly gave the university authorities a right to choose both books and methods in the schools, and that the children who go there must submit to their regulations. The refusal of a pupil so to conform constitutes the disciplinary fault which comes under the purview of the punishments drawn up to regulate a management of the school. At the same time, however, the Council of State pointed out to parents the way in which their end could be obtained. The text itself of the decision must be reproduced because of its perfect clarity and characteristic conclusion. "If parents think the school text books are drawn up in violation of that principle of educational neutrality consecrated by the law of March, 1882, as a result of the lay system then inaugurated, they must bring their claim before the competent authorities. Notably they have the right to demand from the Minister of Public Instruction the rejection from the public schools, conformably with Article 4 of the Act of Feb. 27, 1880, of such books as may be found blameworthy and only then can they go to the Council of State on the ground of excess of power."

So did the Supreme Court erect for the benefit of parents a completely protective system against

all possible violations of the law of neutrality.[22]

In the case where the details are rather interesting the Council has provided an analogous solution. In appearance the case was no more than a mere village quarrel; in fact, it raised the gravest of problems. The case arose in connection with the postal and telegraph service. As a result of quarrels between the postmistress and a householder in the commune who, so the postmistress said, possessed a savage and dangerous dog, the Under Secretary of State for post and telegraphs decided that telegrams should no longer be delivered to his house until he agreed to put a box and a bell at the bottom of his garden. Plaintiff claimed that the secretary had gone beyond his powers. He asserted that the act was contrary to the law regulating the telegraph service and especially contrary to the decree of Jan. 12, 1899—according to which telegrams must be given either to their recipient or his representative. To deprive a private citizen of these advantages, some fault must be shown on the part of the recipient, and the administration must prove the fact of the fault. Since all these elements were absent in the decision, the Council of State annulled the action of the Under Secretary and so assured to the citizen the full and regular advantages of the service.[23]

[22] See the six decisions, Jan. 20, 1911, Recueil, pp. 75-7, and April 8, 1911, *Ibid.*, pp. 481-2. *Cf.* Revue de Droit Public, 1911, p. 69, and Sirey, 1911, iii, 49.

[23] Decision of Dec. 29, 1911, Revue de Droit Public, 1912, p. 38.

This legal protection of the private citizen has sometimes been indefinitely organized by statute. The law of July 15, 1883, gives free medical assistance; that of July 14, 1905, assures support to the old, the infirm and the incurable. It is usually said that the law of 1905 recognises that old men and incurable have a right to support. That, however, is not accurate. The real fact is that the old and the infirm who are without means have been placed in a definite legal situation. They can compel the annulment by the competent authority of an administrative decision, which, when their age, infirmity and poverty have been legally established, refuses to them an allowance or a lodging. Statute thus establishes for a definite public service the same system of legal protection as the courts have established for the administrative services in general. I have discussed this jurisprudence in some detail because of its novel spontaneity. It is at once the consequence and the proof of the transformation I have been trying to describe. Because the subjective right of the state and the individual are disappearing, we get the formation of an objective governmental duty in regard to public services, the operation of which is legally guaranteed.

I am glad to think that, by different methods and in different terms, so eminent a publicist as M. Hauriou has arrived at exactly the same conclusion, when he says:[24] "the public services are considered in re-

[24] Principes de Droit Public (1910), p. 94.

lation to the public that makes use of them they constitute . . . established situations. The public is not the creditor of the public services; what it can do is to profit from them. Private citizens have at their disposal a practical means of improving their situation. They can formulate a claim and ask the Council of State to decree that the authority has gone beyond its powers; but this practical means does not change the fact that the situation is objective in character."

It is worth adding that this legal protection of the private citizen has been guaranteed by statute. The administration is practically prohibited from preventing judicial action by its own silence. For a long time the government could prevent a citizen from suing it; if it did not answer his request; if there was no administrative act, the Council of State could do nothing. As early as the decree of Nov. 2, 1864, some means of remedy against this danger was achieved. It was decided that if a minister, when the hierarchy of the administration was concerned, does not answer within four months his silence may be interpreted as a refusal and attacked before the Council of State.

This method has been generalised by the Act of July 14, 1900 (Article 3). It was there decided "that in such affairs a case only can be brought before the Council of State by means of an action against an administrative decision. When a delay of more than four months has elapsed without a de-

cision being given the interested parties may consider their request as rejected and sue before the Council of State." So ill-will on the part of the administration cannot prevent the attempt at redress.

One lacuna in this subject still remains to be filled. It is of course true that the private citizen is completely protected where the administration is made responsible in the large degree which is to-day the case. The Council of State will doubtless annul all administrative decisions contrary to the law under which the service operates. But how is the administration to be compelled to execute a decision which condemns it? How make an official respect a decision which annuls his act? How can he be prevented from breaking the law a second time? As a rule, of course, the administration will rarely revolt against the legal decision. The prestige and authority of the Council of State are so universally admitted as to command general respect for its decisions. But it is none the less true that to-day there do not exist any means by which the administration can be forced to conform to those decisions. It is essential that in the future these means should be organised and already their beginnings can be perceived. It is a purely general question to which we shall come later when the evolution of the boundary line between legal and illegal administrative acts have been considered.[25]

[25] *Cf.* chap. vi, below.

CHAPTER III

STATUTE

In any system of public law founded on sovereignty, statute is its clearest manifestation. Rousseau pointed this out on several occasions. By definition statute is the expression of the general will dealing with a general problem, and because it unites the "universality of its will to the universality of the object dealt with," it has a limitless power to command, can never be unjust, and should obtain an unconditional and unlimited obedience.

"It is," wrote Rousseau,[1] "thus immediately clear that we need no longer ask who makes the laws. They are clearly acts of the general will. The prince is not above the laws because he is a member of the state, nor can statutes be unjust because no one is unjust to himself; nor need we ask how one can be free and yet ruled by statutes, since they are only the edict of our will." Thus was born what has been called the fanatic worship of statute.

It is of course clear that statutes are necessary. It is equally clear that the flavor of generality which attaches to statutes constitutes the best guarantee the individual can possess against arbitrary conduct.

[1] *Contrat Social,* Bk. II, ch. vi.

The essential protection of liberty is a principle which can only be individually varied within certain limits fixed by a general will theoretically formulated in advance. In this aspect the new system of public law only gives precision and guarantee to the elements of the earlier system. But, in the latter system, as in Rousseau, statute was the command of the sovereign. As such it could not be unjust and was not subject to reserve or restriction. No tribunal could take cognisance of the constitutionality of statute. It could not ever be suggested that the state in its legative capacity was subject to responsibility.

Such a conception was in clear logical accord with the imperialist system. But it is obvious that, if the theory of sovereignty is no longer the foundation of political theory, the conception is obsolete. If, then, in the legal life of the modern state we take account of facts and of situations, such as the acceptance of a jurisdiction which completely contradicts the theory of statute as an expression of sovereign will, we can show under another aspect the transformation of public law.

I

A statute is a general rule for governing conduct. But because we have to-day eliminated from politics the theories of metaphysics[2] the hypothesis of na-

[2] [*Cf,* however, F. Geny, Science et Technique en Droit Privé, Vol. II, ch. v, where it is pointed out that one of the defects of M. Duguit's work is the absence of an explicit avowal of its implied metaphysic.]

tional sovereignty, that of divine right and of an inheritance from God, a statute can no longer be the formulated command of sovereign power. A statute is simply the expression of the individual will of the men who make it, whether they be the leading statesmen or the private members of a legislative body. Beyond that we are in the realm of fiction. In France, for example, statute is the expression of the will of 350 deputies and 200 senators who usually form the majority in the Chamber and in the Senate. Administrative orders, which are, in fact, real laws, express the will of the statesmen or civil servants who issue them.

This realistic conception of the state necessarily results in a realistic conception of statutes. Of course a statute is universally admitted to possess an obligatory, even imperative, force. A statute, it may be, is no longer the order of a superior imposed upon an inferior will. But it still remains true that civil servants and private citizens must obey statutes. The power of compulsion at the disposal of the government may necessarily and can legitimately be applied to ensure obedience to them.

These are not contradictory conceptions. It is clear, as I have pointed out, that there is an objective law superior to government. As soon as a human society exists, the indispensable condition of its maintenance is a social discipline. While we reject metaphysical theory, it is of course clear that the social

environment necessarily gives rise to a rule of social conduct. But the idea of this social rule is in no sense metaphysical. It does not transcend society. So to argue is to use philosophical terms immanent in it. It is an element of society, or rather it is society itself. We obey this rule, not because it creates a superior duty, but simply because we are, for good or ill, members of society, and therefore necessarily subject to its social discipline. It is, for example, clear that the rule prohibiting such conduct as murder, pillage, and arson existed as a rule of right before it was formulated into positive statute. It is clear to all of us that it has an obligatory character, not transcendent and abstract, but based on the facts of life.

Once that is understood, it becomes clear why a statute compels us to obedience. It is not, technically speaking, a command. It is yet compelling because it formulates a rule of law which is itself the expression of social facts. These are the statutes I have elsewhere called normative.[3] The clearest examples of them are penal statutes, or at least those which define and prohibit certain offences. Penal laws which actually fix a penalty belong to the character of constructive statutes which I shall have later to discuss. In the domain of civil law there exist certain rules which are also normative statutes, such as those implied in the principles of Art. 1382 of the

[3] L'Etat, Vol. I, p. 551f.

civil code: "Whatever act of one person causes damage to another creates by the fault concerned a duty to repair the damage that has been caused." The principles inserted in the different Declarations of Rights are often rules considered superior and anterior to the legislator.

We say that normative statutes are imposed on all because they contain a rule of law every ruler recognised at a given place and time. This idea has been remarkably worked out by Prof. Dicey in his fine book on Law and Public Opinion.[4] "There exists at any given time a body of beliefs, convictions, sentiments, accepted principles, or firmly rooted prejudices, which, taken together, make up the public opinion of a particular era, or what we may call the reigning or predominant current of opinion, and, as regards at any rate the last three or four centuries, and especially the nineteenth century, the influence of this dominant current of opinion has, in England, if we look at the matter broadly, determined, directly or indirectly, the course of legislation."

It is not true only of England but for every country in every age. It may be added that if opinion is the essential factor in the making of law it plays this rôle only when men think that a certain rule is imposed by a social sanction. In other words, public opinion only makes legislation when the individual minds that have formed it possess juristic content. There

[4] Law and Public Opinion (2nd ed.), p. 19.

comes a moment when the clear necessity of certain rules is so profoundly and generally felt by men that every statute which enacts them is universally admitted and possesses for all an obvious character that is obligatory.[5]

It should be added that such normative law must not be confused with custom. Statute and custom are two different things. Statute is the expression of a rule which social needs are elaborating in individual consciences. Sometimes, of course, the same rule finds its first and imperfect expression in a custom to which statute gives later a more precise and complete expression. It is doubtless true that the compelling power of statute and custom is derived from the same source, but they represent different degrees of the expression of objective law. Often the degree that custom expresses is socially defective and the objective law is first and directly expressed in statute.

It has been said that the reality of a rule of conduct founded on social independence does not disguise the fact that the rule itself is ethical and not legal in character. In itself it is not imperative because it only becomes imperative when definitely enacted as statute. The proof of this, we are told, is that before such conduct became statutory there was no prohibition of acts contrary to it. And acts which conform to it had no legal result. Positive statute would then

[5] *Cf.* Deslandres, Etude sur le fondement de la loi, Revue de Droit Public, 1908, p. 33.

be more than the simple statement of a social rule. It would be a social rule to which a legal character had been given.

It is, of course, true that when there is no written statute or, at least, no formulated custom, there does not exist for that rule of law a definite legal sanction. But that does not involve the absence of obligation in that rule of law understood not as a command but as a way of life derived from the necessities of social existence. Nor must we confuse the compelling force of this rule with the sanction which society organises to ensure its acceptance. The way in which society organises the sanction is the subject of another kind of law which for want of a better term may be called constructive.

II

Constructive laws are simply those which organise public services, and they form the greater part of modern legislation. Perhaps no great inconvenience is involved in the denial that normative laws exist; there would still remain the fact that every general disposition of government which aimed at the organisation of a public service would be imposed on all under the legitimate sanction of material constraint. Indeed, in the issuance of such dispositions government only fulfils the social function incumbent upon it from the situation it occupies. I have pointed out that it is not necessary to know if there is a rule of

law earlier in origin and superior in force to government. For the same reason we need not enquire if normative laws exist, for if they do they are only the expression of this rule of law. For myself, it seems clear that this rule of law and the statutes that are its expression have an actual existence. They must be postulated because we cannot do without them. The very condition of social life involves our organising certain activities with public services; and it is from this that their operation has the social force and value involved in their general rules.

A conception, Greek in origin, but full of importance in our own time, is here important. We have to know why in the organisation and operation of public services government must lay down general rules and take individual action only within the scope of those general rules.

The answer is that this is the surest guarantee the individual possesses against arbitrary action.

So may be defined both in its complexity and unity the compelling power of statute. It is complex because it is based not only on the general character inherent in statute, but also upon the purpose it is to serve. It is unified because it is essentially founded on the duty of government to assure the operation of public services.

In truth, there is no statute which does not organically control some social need and derive its power therefrom; and there are many which can only be explained by this means. This is true of all statutes

properly called organic, that is to say of all statutes which regulate the internal organisation of the state. If we admit the personality of the state, and define law as the command of its sovereign will, it is absolutely impossible to understand how organic laws can be really laws since the state cannot address a command to itself.[6] On the other hand, however, the compulsion inherent in such regulations is very clear if it is derived from the duty imposed on government to organise means of satisfying social needs. Statutes which serve this purpose are obligatory in character simply because of the end they serve. Constitutional statutes, and those which regulate general administration, are fundamental because their object is to give the state the best means of serving social needs.

The same may be said of penal laws. They are *par excellence* imperative in character; or, rather, they are prohibitions addressed to private citizens. The more closely we perceive them the more it appears that they are not really an injunction addressed to the private citizen. The legislature does not—because it cannot—tell us how to kill and rob and so forth. It simply organises a public means and settles that if an act which it foresees and defines and describes as an infraction of law is committed, the courts will pronounce a penalty against the author of

[6] [But in the German theory, mainly associated with the name of Jellinek, of auto-limitation, this is virtually possible.]

it. The penal imperative, as Binding says,[7] is not addressed to private citizens. The basis of the right to punish cannot be discovered by knowing on what foundation there rests the right of society to say what is permitted and what is prohibited. Government must assure, as has always been admitted, the internal security of the nation. Its penal legislation is the means adopted to that end and derives therefrom its character of legitimacy and compulsion.

Finally, civil legislation is, as much as police and justice, the institutional satisfaction of a public need. It may be asked how it can be imperative since all civil legislation, and particularly Art. 6 of the Code Napoleon, decides, as a principle, that private agreement may abrogate civil legislation. This has led to the argument that civil legislation concerns the officers of justice whose business it is to legislate on quarrels between private citizens. The parties to an action may make agreements contrary to all civil laws without affecting public order or morals; but the law settles the judge's duty in very definite fashion. He must judge private relations by the agreements into which the parties have entered. If there are no agreements, or if they are obscure, he must then settle the problem in accordance with the common law. Clearly then the common law supplies a public need —that of justice. Statutes which deal with public

[7] Binding, Die Normen, I, p. 66 (2nd edition).

order and morals, like those relating to domestic organisation, or the capacity of parties, and so forth, cannot be abrogated by agreement. This in itself settles the rôle and duty of the judge, who must declare all such agreement null and void. They are thus organic laws in the service of justice.

Even in regard to the civil service a statute is not an order. Its force is derived from its relation to a means of satisfying the social need. I admit freely that, thus far, the character I have ascribed to statutes has been derived from purely theoretical arguments and that its relation to the facts must be still determined. They are completely antithetic to the imperialist conception. In that system of law four conclusions followed which were accepted as sacred dogma: (1) A law was a decision derived only from the people or from its representatives; (2) A law being derived from the sovereign will of the state is subject to no form of action and gave rise to no responsibility; (3) A law, from this character, was like sovereignty—one and indivisible. A country, therefore, could not have statutes passed by districts or groups. (4) As a command, a statute was always a unilateral act. Statutes and agreements were mutually exclusive ideas. A statutory agreement was a contradiction in terms.

To-day none of this is true. There are statutes which are not derived from the people or its representatives. Statutes may give rise to action and involve state responsibility. Districts and groups pass

their statutes. We have agreements of statutory force. These changes must be studied in detail.

III

In the first place it is clear that if a statute is the command of the sovereign power it can be made only by the instrument in possession of that power. For a long time, indeed, the principle was considered absolute that statutes can emanate only from a body like parliament of which the national composition gives it the diverse prerogatives of national sovereignty. This is at bottom the celebrated principle of the separation of powers. In Art. 3 of the preamble of the third chapter of the Constitution of 1791, it was said that "the legislative power is delegated to a national assembly composed of temporary representatives freely elected by the people." In title 3 it states that "the Constitution delegates exclusively to the legislative body the powers and functions hereinafter mentioned; to propose and decree laws; the king may only invite the legislative body to take a subject into consideration." [8] The power of making a law is thus so exclusively the prerogative of the national representatives that they are even given the exclusive right of legislative initiation.

Nor is this all. In chapter four of Title 3 of the Constitution of 1791 it is stated that "the executive power can make no law even of a provisory kind; it

[8] Art. 1, ch. iii, § 1.

can only issue proclamations in accordance with statute either to order or to repeal their execution." However it has been interpreted, the purpose of this is very clear. It entirely deprives the king of what is to-day called the power of ordinance. The word proclamation is characteristic. It implies that the royal act is not in itself valid, is not a rule the courts must accept, but only an instruction addressed to the civil service ordering or repealing the operation of a statute. The same principle was clearly formulated in the Constitution of the year III: "A statute is the general will of the majority of citizens or of the representatives." [9] The Directory could issue no proclamations other than those which either conformed to, or applied, statutes. Despite these restrictions, there are from this time the so-called decisions of the Directory—a large number of acts, certainly other than proclamations, which are general rules inherently calling for execution, like statutes, by the courts and the civil service.

Under the Consulate and the First Empire the number of general regulations issued by the government grew to great proportions. The Constitution of the year VIII no longer speaks of proclamations but of ordinances. "The government proposes laws and makes the ordinances requisite to their execution." The change of terms is characteristic; they are no longer dealing with acts which enforce a law, but with an act containing a rule imposed by its own force. From the year VIII, whatever may be the

[9] Constitution of the Year, III, art. 144, §§ 1-2.

form of government—empire, kingdom, republic—the number of ordinances issued by government constantly grows. Of course if we accept the charter of 1814 which (Art. 14) gives the king the right to issue the ordinances necessary to the operation of statutes and the safety of the state, all other constitutional acts relate the ordinance power of the head of the state to his executive power and give it the general purpose of executing the laws. These restrictions are powerless. The facts, as always, are stronger than constitutions; the ordaining power constantly grows and we have made ordinances which cannot be merely related to the execution of the laws. So, alongside legislation properly so called, we have a legislation which is really executive in character and yet which has for private citizens, administrators, and the courts, the same compulsion as formal statutes.

We cannot here discuss the endless controversy which has arisen over the ordaining power of the French president, particularly in relation to a supposed delegation of legislative power given to him by parliament. The undeniable fact is that the president issues to-day not only ordinances related to earlier statutes, but also many independent ordinances which are in no wise attached to a formal statute and are yet generally accepted as valid. Of this latter kind, for example, are the general police regulations issued by the president.[10] All these reg-

[10] *Cf.* the Decrees of March 1, 1899, and Sept. 10, 1901, on motor-cars, and that of Oct. 8, 1901, on internal navigation.

ulations cannot with the utmost subtlety be specifically distinguished from statutes.[11]

By their very definition these general regulations are undeniably imposed on private citizens, the administration and the courts. To violate them is the same thing as to violate statutes.

This does not mean to say that the president can issue ordinances on every subject. There are certainly matters, called legislative, which are within the competence of parliament alone. That, however, is a question of capacity and does not touch the fundamental point that there is no difference between statutes and ordinance.

And, even if there did at one time exist such a difference, it is tending quite naturally to disappear; is even perhaps already obsolete. If it did exist it can only be for the reason that M. Hauriou has given. Statutes, according to him,[12] are general limitations on the full activity of the individual. Ordinances are general regulations of which the purpose is to organise and operate some public service. I have shown above that this is supremely the purpose of statutes. The fundamental point is that in the evolution we are witnessing there are regulations of a statutory character which do not come from the general organ of sovereign power. As a consequence statute

[11] [On the president's power of ordinance *cf.* Berthélemy, Le Pouvoir Réglementaire du Président, in Revue Politique et Parlementaire, Jan.-Feb., 1898.]

[12] Droit Administratif (7th ed.), p. 50.

and sovereignty have no longer the necessary connection.[13]

It may be said that the distinction between statute and ordinance consists in this, that an ordinance may be attacked for illegality while the statute is not subject to legal defect. While this is true, it is tending to disappear and in some countries is non-existent. Nor does it touch the intrinsic nature of the acts. To attack legality does not depend on the intrinsic nature of the act considered but on the character of the instrument or the agent from whom it emanates. If statutes are not subject to legal attack, it is only because French law has not yet admitted that the acts of the legislative body can be submitted to the courts. This represents, of course, the survival of the old idea that the legislative body mirrors the sovereignty of the nation. But, as we shall see, it is exactly at this point that we are arriving. The time is not far distant when statute no less than ordinance will be subject to the control of the courts.

IV

In the imperialist theory the irresponsibility of statute was natural. As the order formulated by the sovereign will it could be presumed to express a rule of law. A court cannot question statutes because its business is to apply the law of which a statute is the

[13] Moreau, Le Réglement Administratif; Duguit, Traité. L. 137, 201 seq. ii, 451.

principal source. This is more true because sovereignty is not a matter of degrees; and since a statute is its direct manifestation no authority is competent to measure its validity.

In England this point of view is still good law. Everyone knows the famous saying that the English parliament can do everything except make a man a woman. Professor Dicey has shown in a very striking fashion the meaning of that principle. "Parliament means, in the mouth of a lawyer (though the word has often a different sense in ordinary conversation) the king, the House of Lords, and the House of Commons; these three bodies acting together may be aptly described as the 'King in Parliament,' and constitute Parliament.

"The principle of Parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of parliament." [14]

In this respect England does not seem likely, for the moment at least, to change its system of jurisprudence.

In America and France, however, there are signs of a great change which, in the latter country, is not yet ended. The starting point of this evolution is the recognition, at the end of the eighteenth century,

[14] Law of the Constitution (8th ed.), pp. 469-76.

of a distinction between ordinary laws and constitutional laws. To avoid confusion, Professor Dicey calls such constitutions as make the distinction rigid. I cannot here explain the circumstances of its origin and development, particularly the mutual relation of French and American ideas.[15]

By the end of the eighteenth century the distinction had become both in France and America an essential principle of public law. We must not exaggerate its importance. It in no wise implies the recognition of a constitutional law-making body and an ordinary statute-making body each equally sovereign in its own domain. Still less does it imply the recognition of a constitution making body superior in power to the ordinary legislature. In the theory of public law founded on sovereignty that sovereignty is unified and does not admit degrees. Every statute, whether constitutional or not, is a command of the state in its sovereign capacity. But the order is expressed in different forms where the law is constitutional in character. This is important because it means that the nature of constitutional law forbids its change by ordinary law; and modification can come only by another constitutional law or some special method.

This defines clearly the question that must be put in France and America. When the ordinary law-

[15] *Cf.* Borgeaud, Etablissement et Revision des Constitutions (1893); Gajac, De la Distinction Entre des Lois Ordinaires et Constitutionnelles (1911); Duguit, Traité, II, 513f.

making body passes a statute which violates the constitution, can it be annulled by the courts? Is there a court competent to pronounce this annullment? At present no such court exists. It is of course true that in Art. 21 of the Constitution of the year VIII and the Art. 29 of that of 1852, the senate, being a conservative body, was given the right to maintain or annul all acts, including those of the legislature, which were submitted to it as unconstitutional. But neither the senate of the First Empire nor that of the Second used the power so conferred; they were no more than an instrument which permitted the Emperor to alter the constitution at his pleasure.

Another question which differed from, but which was connected with, the first, may be asked. Where a man is charged before a civil or criminal court with the violation of a statute is the plea of its unconstitutionality a good defence? May the court not indeed pronounce the statute void, but refuse to apply it on the ground of its unconstitutionality. The United States has answered this question in the affirmative. It is to-day well settled that any court can accept the plea of unconstitutionality and refuse to apply an unconstitutional law. At the same time not even the Supreme Court can annul a statute.

Let us consider the development of the solution in America. It surely derives from the memory of the Colonial period when the courts could, and logically had to, refuse to uphold statutes which went outside the limits of legislative power conferred on the col-

onies by the mother-country. The necessity of settling the conflict of laws in a federal state is an obvious source; and though the constitutional text invoked is in fact unrelated to the question, it has been used as a basis for this jurisprudence. And the path that the Supreme Court has trodden others have followed. But I cannot dwell longer on this matter.[16]

The evolution in France has been different. It has long been an accepted dogma that no court could accept a plea of unconstitutionality and refuse to apply a formal statute even where they considered it unconstitutional. That an ordinance might give rise to a plea of illegality was undoubted even where the president had acted by express delegation of parliament. The basis of this solution has been found in the Penal Code (Art. 471, No. 15), which as a fact deals only with ordinances to which a penal sanction attaches. But it now applies to ordinances of every kind.

There we have stopped. For a long time legal theory and legal decisions have unanimously agreed that no court can pass upon the constitutionality of a statute or refuse to apply it on that ground. The thought underlying this attitude is clear enough. A statute, in its view, is the expression of a national sovereignty upon which no court is competent to pass

[16] [See Beard, The Supreme Court and the Constitution, for a full discussion *cf.* this question.] *Cf.* Nerincx, L'Organisation Judiciaire aux Etats-Unis (1909), p. 36 seq.; Laraude, Bulletin de la Société de Législation Comparée (1902), p. 179 seq.; Boudin, Pol. Sci. Quarterly (1911), p. 338.

judgment. It is the logical consequence of a theory which, making the courts the servants of the state, prevent the opposition of their will to that of the state in its legislative capacity.

The usual explanation is however different from this. It is generally deduced from the principle of the separation of powers. The judiciary must not encroach upon the legislature or the executive. Texts are cited insisting on this separation.[17] These texts in reality have no connection with the question. The principle of the separation of powers leads to an entirely different solution. A court which refuses to apply a statute on the ground of unconstitutionality does not interfere with the exercise of legislative powers. It does not suspend its application. The law remains untouched except in relation to the issue in question. It is simply because the judicial power is distinct from and independently equal to the two others that it cannot be forced to apply the statutes it deems unconstitutional. This has been understood in America, and the principle of the separation of powers has logically given American courts the right of judicial review. For, after all, to take away that power is to make the courts inferior to the legislature and, by that dependence, to violate the principle of separation. So that the real reason why French courts do not exercise the power of judicial review is simply that statute as the expression of the state's

[17] *Cf.* Constit. of 1791, art. iii, chap. v., tit. iii; Law of Aug. 16, 1790, art. 10, tit. ii.

sovereign will must be imposed without restriction or reservation.

V

If, as I suggest, the conception of sovereignty is in process of disintegration, we ought to find an increasing tendency to confer on the courts the power of judicial review. It is exactly this that has happened. Of course the judges themselves have always refused in France to discuss the constitutionality of statutes, and to-day they would not decide differently. The precedent of 1833, when such a plea was rejected by the Court of Cassation, still holds good. A journalist had appealed against the law of Oct. 8, 1830, on the ground of its unconstitutionality. This plea was held bad on the ground that "since the statute was discussed and promulgated in the form prescribed by the Charter the courts cannot entertain an attack on its legality." [18]

On the other hand, French judicial theory and the jurisprudence both of the Council of State and certain foreign systems of French inspiration tend more and more clearly to accept the necessity of judicial review. In 1894 in an article in the *Monde d Economique,* Professor Beauregard, now a member of the Chamber, urged that the courts were in duty bound to hold of no effect a statute establishing the principle of Cadenas on the ground that it violated the constitutional principle that taxation could derive only

[18] Sirey (1833), I, 351.

from the decision of Parliament. In 1895 M. Jèze did not hesitate to urge [19] that if a statute violates the constitution the courts cannot apply it, because in the presence of contradictory authorities they must enforce the superiority of the constitution. That attitude is gaining increasing acceptance among competent authorities.[20]

This thesis has also been defended by M. Hauriou.[21] In its decision of Aug. 7, 1909, the Council of State refused to annul the decree which dismissed a large number of postal employees for going on strike. The decree obviously violated Art. 65 of the Financial Act of April 22, 1905. By its terms no civil servant could be dismissed without the ground of his dismissal—at least, the fact of his approaching dismissal—being first communicated to him. M. Hauriou very justly observes that those who support the decision cannot justify the explanation given by the Council of State itself. That solution can be explained only on the theory that if Art. 65 of the Financial Act of 1905 was applicable even to a case when a strike involved the dismissal of certain civil servants, it would be unconstitutional on the ground that it was incompatible with the essential conditions

[19] Revue Générale d'Administration (1895), II, 411.

[20] Such as Saleilles and Thaller, Bulletin de la Societé de Legislation Comparée (1902), p. 240 seq. [*Cf.*, however, Mr. Asquith's repudiation of the idea of judicial review during the debates on the third Home Rule Bill, Hansard, Fifth Series, Vol. 42, p. 2229.]

[21] Sirey (1909), III, 14.

of state existence. For the regular operation of administrative business is the very *raison d'être* of the state. When the Council of State therefore supported the decree of dismissal it simply refused to apply an unconstitutional statute. M. Hauriou is patently right; and his theory involves the conception of the state I have suggested as a group of public services guaranteed and controlled by government.

This solution, moreover, has won the adherence of Professor Berthélemy.[22] At the present day it is extending itself all over Europe. In Germany Professor Laband [23] tells us that after much discussion the immense majority of German jurists are in favor of judicial review. In Norway the power has been logically deduced from the recognised character of the judicial function without the need of a formal text. It was recognised in 1890 by the Supreme Court of Norway and in 1893 by the District Court of Christiania. In 1904 the first Chamber of the Areopagus asserted this doctrine in the clearest terms.[24] A recent decision of the Court of Ilfor confirmed by the Rumanian Court of Cassation has adopted this attitude in very remarkable terms. They owe their clarity to a most remarkable opinion given by MM. Berthélemy and Jèze [25] in a case between the city of Bucharest and its tramway company. The

[22] Sirey (1912), IV, 12.

[23] Droit Public, II, 322.

[24] Revue de Droit Public (1905), p. 481.

[25] Revue de Droit Public (1912), p. 139. Sirey, IV, 9 (1912).

company asked the court to prohibit the application of the law of Dec. 18, 1911, on the ground that since it violated Arts. 14 and 30 of the Rumanian constitution by attacking the right of property, it was unconstitutional. The court accepted the plea in a very striking judgment. A month later the judgment was confirmed by the Supreme Court in the following terms: "If in a case plea is made that a statute is unconstitutional, the judge cannot refuse to try the issue. Exactly as where two ordinary statutes conflict it is his right and duty to decide which of them must be applied and it is as much his duty even where one of these two laws is the constitution. Within these limits, the right of judicial review is incontestable. The power flows primarily and naturally and logically from the nature and character of the judicial function of which it is the business to enforce the law; and the law of the constitution equally. There exists no clause in the constitution which deprives the judiciary of this power." [26]

It is clear from these facts that if European jurisprudence does not yet admit that a court can annul a statute for violating a superior rule of law, it very clearly tends to admit the plea of unconstitutionality to any interested party. French jurisprudence will certainly be led by sheer force of facts to this conclusion. Probably the evolution will be inaugurated by the Council of State. I have already suggested the

[26] Revue de Droit Public (1912), p. 365 seq.

avenue of approach in discussing M. Hauriou's very plausible interpretation of the decision which upheld the decree of 1909. For a long time past the Council of State has accepted the plea of illegality in regard to administrative regulations even though it considers them as issued in virtue of legislative delegation. Since 1907 the Council of State had admitted the plea of excess of power against these same regulations even while it maintained the theory of delegation.[27] Now if there is delegation, logically administrative ordinance is in reality the work of parliament; for unless delegation means nothing, it means the transmission from one institution to another of its own power.

The path from the consideration of administrative ordinance to formal statute is easy and short. It is therefore likely that in the near future this change will become established fact. It is in this connection interesting that the Chamber of Deputies should have been presented with certain measures directed to this end. On Jan. 28, 1903, MM. Jules Roche, Charles Benoist, and Audiffred proposed a bill which added the following article to the constitutional law of Feb. 25, 1875: "A Supreme Court should be established charged with passing upon the claims of citizens for the violation of their constitutional rights of the legislature in executive power." On the same day M. Charles Benoist presented a bill for the es-

[27] Recueil (1907), p. 913; (1908), p. 1094; (1911), p. 197.

tablishment of a Supreme Court which should take account of attacks on the rights and liberties of citizens.[28]

[28] Journal Officiel, Proc. Parl. Chambre (1903), pp. 95, 99.

CHAPTER IV

SPECIAL STATUTES

OTHER facts tend to make clear the disappearance from statute of the ideas of a sovereign command. And it is exactly here that there is to be discerned the profoundest change of modern times. The theory of a sovereign state, indeed, its emanation from a nationality, situated on definite territory, and organised into a government, was rigorously logical enough. It swept all wills save its own from the field of control. The texts bear witness to the immense influence it exerted.[1]

The consequence of this theory is clear. If law is the expression of the unified and sovereign will, it is evident that on a given territory there can only be one law and that the members of a nation recognising only that one law can admit the validity of no other form of statute. But we shall see that in the modern state alongside national laws there are local laws and group laws which the citizens accept and the courts enforce.

[1] *Cf.* the Constitution of 1791, title iii, art. 1; Constit. of 1848, art. I.

I

Obviously the sovereign cannot admit a federalist organisation. Every one knows with what fierce indignation the Convention attacked every governmental attempt into which federalism might rightly or wrongly be read. By federalism the convention understood what we to-day call decentralisation—that is to say, any system in which a territorial area is self-governing. That this was contrary to the principle of unified sovereignty had been clearly announced by those who wrote the Constitution of 1791. It is true that the national assembly of 1789 had established a system of local decentralisation in the twofold sense that all local civil servants were elected and that the control of the central government was greatly narrowed. But the constitution laid it down that "the Administration is not a representative agency. Its members are elected from time to time by the people to exercise administrative functions under the supervision of the authority of the Crown."[2] Thus although the local organs were elected, the representatives of the local group and its will, so far as it had a will, had no representatives who could pass a local law. Country, nation, sovereignty, law—all these were one and indivisible.

To-day all this is changed. Every impartial observer must be impressed with the variety of law and especially with its localisation. It is very striking in

[2] Constit. of 1791, tit. iii, chap. iv, sec. ii, art. 2 and 3.

federal countries when on the same territory federal law and state law are both applied.[3] If we do not insist on this evidence it is not because the growing conception of federal government is not important, but because the antinomy between imperialist theory and federalist fact is so clear as not to need discussion.

Moreover, it is not only in federal countries but even in unitary states like France that this localisation of law is apparent. Law, above all, is a rule which derives from the central government and is applicable in theory to every individual in the state; but, by its side, local laws begin to make their appearance.

In France, since 1871, the question of decentralization has been frequently discussed.[4] The law of Aug. 10, 1871, on general councils was a step in this direction. The authors of the law of April 5, 1884, tried, with little justification, to create a decentralised system. Parliament has for several years discussed different proposals which have aimed at substituting a district for a department in order to create a real autonomy and to enlarge communal powers. Several men of ability have hoped that a system of

[3] [On the other hand, the observer should note the growing tendency towards federal control. *Cf.* Franklin Pierce, Federal Usurpation, 1908, and Laski, Problem of Sovereignty, Appendix B.]

[4] [The literature is enormous. *Cf.* especially P. Deschanel, La Décentralisation, 1895; M. Hauriou, La Décentralisation, 1893, and Charles Maurras et J. Paul-Boncour, Un Nouveau Débat sur la Décentralisation, 1908.]

electoral reform, which should include the *scrutin de liste* and minority representation, would be the prelude of a great administrative reform in a decentralizing direction. But since neither of these has happened we must discuss only what has actually occurred.

To-day, both in fact and in law, the communes, or at least the great towns, have undoubtedly a power of legislation distinct from that of the central government. The limitation derives from the fact that even if, in law, a municipal system is the same both for large and small communes, the force of circumstance has made the autonomy of the great towns alone a reality.

It is of course true that as the nation created this system of municipal autonomy so the nation can take it away. But custom has given such popularity to this burghal independence as to render its complete withdrawal impossible.

However that may be, in a limited field and notably in regard to police and municipal services, mayors can make, under the name of ordinances, true communal statutes. These ordinances constitute in a real sense an objective communal law applicable to every one in the area to which they apply. If they do not modify, they may at least augment, the duties derived from the national system of police. They are real statutes in the sense that they are general regulations to which obedience is secured by a penal sanction. To act in conformity with them may pro-

duce a situation entailing legal rights; to violate them involves due legal responsibility.

By statute, by custom, and by the attitude of the courts, these communal statutes have come to be regarded as made in the name of the local group. In every French commune to-day the mayor is elected by the municipal council which is in turn elected by universal suffrage within the commune.

The law of 1884 did not give to the municipal council any control over municipal regulations. But in fact custom has given it that power. There is no town in France where its wide exercise is not apparent; and some recent legislation, such as the statute of Feb. 15, 1902, associates the Municipal Council with the drawing up of police regulations. It is everywhere recognised to-day that the prefect, though he is the agent of the central power, cannot change the mayoral regulations, but only annul them for illegality, and cannot take the mayor's place when the latter has taken all necessary police measures. If the prefect goes beyond his powers on this question, the mayor can go to the courts and have the prefectorial decision annulled. Clearly, therefore, the mayor is for his commune not merely a subordinate of the prefect but a real legislator who acts as a representative of his locality in its decentralised form.

Several decisions of the Council of State have thrown this into striking relief. Most notable is the decision of June 7, 1902, which accepted the plea of the mayor of Néris against the decision of the prefect

of Allier.[5] The latter had issued regulations in regard to the casino of this holiday resort which were in contradiction to those issued by the mayor for the territory under his control. In 1910 the Council of State decided in the mayor's favor, and it has accepted the plea of a mayor against a prefectoral decision, annulling a decision in which a mayor has repealed a regulation of one of his predecessors prohibiting processions.[6]

That municipal regulations are clearly communal statutes is clear also from the point of view of liability. The Council of State tends more and more to recognise communal liability for municipal regulations. The cases on this question clearly relate themselves to that evolving jurisprudence which recognises public responsibility for public acts. Its evident implication is that a municipal regulation is really a communal statute because it is the commune which bears the responsibility so created. This responsibility was recently recognised when a mayor illegally regulated the use of the church bells and, notably, ordered them to be used for civil funerals. The Council of State annulled the decision and recognised in principle the liability of the commune to the vicar for the moral prejudice created by the regulation.[7]

[5] Sirey (1902), iii, p. 81.

[6] Conseil d'Etat, Dec. 16, 1910; Recueil, p. 957.

[7] Le Temps, June 17, 1912.

II

Not only are there local statutes but there are also statutes concerned with public administration which, in so far as that administration is decentralised, have a similar limitation. This administrative decentralisation is one of the most interesting phenomena of our time.

I have already pointed out the increasing development, especially in France, of an administrative decentralisation which associates the civil servants with the control of the service concerned. This system is concerned only with technical services and not with such as those of war and justice which must always remain under the control of the central government.

The elements of such a system consist, outside the participation of its agents and the direction of the service, in its corporate organisation and its patrimonialisation. That is to say, it is given an independent budget of which the management under government supervision is confided to the officials themselves. This governmental supervision is found, above all, in the system of obligatory expenditure; that is to say, in the power of government to compel certain expenditure deemed by it necessary to the proper functioning of the service in such cases as its managers should disagree with the Budget. The necessary counterpart of decentralisation is the personal responsibility,

under personal recognition and vigorous sanction, of the officials to the public.

We have taken only the first steps towards this organisation. But there are signs that this evolution will proceed more rapidly, and that it is becoming the vital condition of the extension of state powers if the excessive absorption of individual initiative is to be avoided.

In France the public departments are an obvious example of functional decentralisation. These departments are public services with their own budget and their own administration. Their officials form a managing council which, while it is to-day of a narrow kind, will certainly extend. The ideal type is that of our universities created by the law of July 10, 1896, and organised by the great decrees of the next year. They have each an autonomous budget; under state supervision, they are managed by a council entirely composed—with the exception of the Rector, who is its president—of professors elected by their colleagues from the university concerned. The teachers in higher education have a strongly protected status and are subject to the discipline of a university council which is nothing so much as the council of an independent corporation; while appeal lies in the superior council of instruction made up for the most part of elected members.

Parallel with the tendency towards administrative autonomy in each service, there is a tendency also to give the civil servants a special status. This status

connects two intimately related ends. On the one hand it aims at protecting the official from arbitrary attack, at securing him his position, his regular advancement, and the means of defence against political influences. On the other hand it aims at securing the civil servant's affection for his employment with a view to its improvement. It is this second aim that is the most important. Law tends to protect the civil servant not in his interest but in that of the service; or rather it only protects him in the interest of the service. This status will vary with the different departments. It is true indeed that several years ago the Chamber of Deputies considered the proposal for the establishment of a law regulating the position of all civil servants with some few exceptions; and that at the end of 1911 M. Maginot presented a remarkable report on this question. But the Chamber has not yet discussed the project and it is doubtful if it ever will do so. The variety of the departments is already so great that it is impossible to secure any general status by law.[8] The solution of the problem is a separate departmental status established by agreement between the Minister and the permanent officials.

The close relation between functional decentralisation and the status of officials is clearly set forth in the financial law of 1911 (Art. 41 following), which gave some degree of autonomy to the state railways.

[8] [It has, however, been proposed by a distinguished civil servant. *Cf.* G. Demartial, Le Statut de Fonctionnaires, 1909.]

Art. 56 created a council called the Council of the System to which four officials are appointed, chosen by the Minister from the delegates elected to the diverse committees and commissions of the system. This council must give its advice on the rules relating to official status (Art. 58, No. 2). This status which, according to Art. 68, was to be applied within a year, was established as the result of an agreement between the minister and these respective delegates. There have been some protests from the officials concerned. But with the coming of calm the agreement has been applied. Inherently interesting as it is, it is above all important as the herald of what will probably be the future organisation of such public services as are technical in character; unless revolutionary effort does not hinder and falsify this normal evolution to the detriment of those it pretends to serve.

The establishment of a statute for each separate decentralised service is the establishment of a statute distinct from national legislation. An autonomous department with its own budget is a self-sufficient legal organism and must therefore have its own law. The whole object of that law is simply to regulate its organisation and functions; and the law established is in the full sense a statute; that is to say, it is a general regulation based upon legal sanction the violation of which brings the offender before the courts.

An instance of a statute distinct from national legislation and applied to a decentralised service ap-

pears very clearly in the case of the charitable administration of a great town. This settles its own organisation and its own bye-laws. Under the name of ordinance it issues a mass of rules which in reality are laws dealing with the management of its business. Their violation again, as the Council of State has often decided, involves annulment. The statute governing an autonomous service is thus distinct from national law both by its purpose and its origin; and the same may be said of the regulations issued by each university for its own administration. Each university council has in this regard a full legislative competence.

III

The law peculiar to each decentralised service is seen in still more striking relief in its relation to the special status which is being established for the civil servants of the different departments. The word *status,* which has become a technical legal term, generally describes the legal situation of a definite person in a given group by reason of his membership of it. Thus, to speak of the status of the civil servants in a given department is to recognise that because they belong to that department they have a special legal position. If, of course, all civil servants had the same status, it would probably follow that its origin was a piece of national legislation. It would be different from the status of the ordinary citizen; but it

would be a general difference arranged in the interest of the national organisation by means of its parliamentary system. The status of civil servants in each department is, however, different. Each department participates in deciding, and sometimes completely determines, the kind of status it will have. Sometimes that status applies, and can only apply, to a single department. We have then a statute distinct from a national statute dealing with a definite group and applying only to those officials whose membership of the group gives to their situation its special needs.

I have already mentioned how in September, 1912, the railway service as a result of an agreement between the management and the employees was given a special organisation. For that purpose a code of rules was drawn up which was essentially a statute in that it was a general regulation to which a legal sanction was attached. It was not national legislation, because it applied only to a group distinct from the nation, and derived both its origin and its purpose from the special position of that group.

This statement perhaps contains the answer to one of the most difficult questions of public law. French and German publicists have devoted much attention in the last few years to the question of the foundation of the character of disciplinary law. The practical question is, how the same act can be the object of disciplinary repression without being the object of penal repression. How, moreover, can the same act be

the object of penal suppression and of disciplinary repression at one and the same time?

In all that has recently been written on this question there is a clear tendency to see in disciplinary law the law of a group distinct from the state. Professor Jellinek, for example, who has so strikingly expounded the theory of the state-person as the possessor of subjective rights,[9] does not hesitate to say that disciplinary repression is entirely different from penal repression in that the former is not derived from the state's power to command. For him, the power to discipline belongs to groups like churches, communes, societies, the family, the public departments and sometimes even the private citizen, who are entirely distinct from the state.

My colleague, M. Bonnard, seems to me to have given the best explanation of the facts.[10] In his view the right to discipline is the penal law of a corporation distinct from the state so that the two laws have an origin and a field of activity that are entirely distinct. He insists that in modern law public activities tend to assume a corporate form. The right to discipline in a public activity thus becomes the penal law of a corporately organised civil service. This fits in very well with a marked tendency of recent statutes and ordinances to give the right of discipline to the corporate councils of the different departments.

[9] System der Offentlichen Subjektivend Rechte (1905), p. 214f.

[10] De La Répression Disciplinaire (1902).

I think it is clear that M. Bonnard too greatly narrows the field of disciplinary law when he calls it the penal law of corporations. It is true, perhaps, that he does not use the word corporation in its historic and legal sense. But he certainly goes too far when he urges, without sufficient limitation, that public activities tend to take corporate form. It is nevertheless beyond question that disciplinary law is neither national, nor from the state, and is, in fact, the penal law of distinct and more or less autonomous groups. Such are associations of a regional or of a social character, like professional trade unions, or voluntary societies, which, without being technically corporations, yet act as units leading towards the corporate type. It is certainly true of public services which become the more autonomous as they become more decentralised.

The disciplinary law of the officials of a given department is, then, the penal law of the group. That group has an organic law. But it has also a penal law of which the basis is the same as that of all repressive law; namely, the need to punish every act which may inherently compromise the life of the group which is here the operation of the service. So public officials are submitted to penal laws of an entirely distinct character. The national penal law has as its end the security of the people as a whole. The penal law of their particular service assures its operation in conformity with its fundamental purposes. Their domain is obviously distinct; but the official

must nevertheless obey both. An act may be punished by one and not by the other; it may on the other hand be punished by both. Penal repression does not exclude disciplinary repression and *vice versa*.

Obviously this renders impossible the imperialist theory of a unified law for all men in a given state.

This discipline is thus simply a part of the objective law by which any given public service is organised; and it may thus itself be organised in the form of jurisdiction. A fault of discipline may be foreseen and defined by the organic law of the service and no act may be punished when it falls within those categories. So too with the penalties concerned. Statute may define the penalty to be pronounced by the disciplinary authority for any given fault. Finally the disciplinary penalty may be pronounced by a real court which assures the accused all the guarantees of ordinary law.

This is certainly the way in which disciplinary repression is evolving. For some officials the power to discipline is exercised by real courts like the Superior Council of the Magistracy, which is only the Court of Cassation sitting in full session; or like the Superior Council of Public Instruction. In some departments the scale of penalties is definitely established. It is clear enough that one day the faults that are to be punished will be defined by statute.

The evolution of discipline, in fact, goes, step by step, along the same road as the public services towards autonomy. We see being built up a penal

law by the side and yet outside of the national penal law. Public law is clearly no longer monistic in its imperialism.

Certain classes of officials are subject to a discipline of a particularly interesting kind. These are the members of the deliberative assemblies and particularly members of parliament.

The regulations of parliament are not formal statutes. They are established by resolutions separately voted by each chamber. They yet constitute for every member a definite law. The chamber may of course modify its ordinance, but so long as it exists it controls the action of the members. These ordinances constitute a penal law applicable to the members. They establish penalties, one of which—censure and temporary exclusion—may, in the Chamber of Deputies, actually lead to imprisonment (Art. 126). This penal law is applied either by the president or by the chamber and is obviously a sentence pronounced by a court. It is difficult to reconcile all this with the conception of law as the command of a sovereign will. It is doubtless a general regulation. But it does not emanate from a power constitutionally established to formulate statutes even though it can contain penal dispositions. I have tried to explain it by suggesting [11] that each political assembly is an autonomous corporation exercising over itself and its members a legislative power, so that its disciplinary sections would be its penal law. But it

[11] Traité, II, 317.

is perhaps simpler and more accurate to see in the legislature not a corporation but an autonomous public service of which legislation is the function. Its rules would then be its organic law and as an autonomous body it would have its special law like the public services of which I have spoken above.

IV.

If deliberate assemblies are not autonomous corporations there are many groups which have this character. The movement towards association, particularly in the trade union world, most certainly remains the distinguishing feature of the end of the nineteenth and the beginning of the twentieth century. The Revolution did not recognise the right of association. Le Chapelier's law expressly prohibited professional groups.[12] The penal code prohibited under heavy penalties every association of more than twenty persons.[13]

It was logical enough. An association, indeed, is a group so formed in the midst of the national life as to break its absorptive unity. The association has its law distinct from the national law—a concept quite impossible in the imperialist theory, which, making the individual a part of the nation, submitted him to the national law as a sole guarantee of his liberty.

[12] June 14–17, 1791.

[13] Arts. 291–2. [On the right of association, *cf.* Weill, Droit d'Association, 1893, and the valuable note in Dicey, Law and Public Opinion (2nd edition), pp. 467ff.]

He was compelled to renounce allegiance to any group save the nation; for that would have been to admit the authority of a law different from its own and so to destroy the unity of sovereign power.

Le Chapelier's law expressed these ideas in their full and logical clarity. In its view, professional associations are contrary to the principle of liberty which is the fundamental basis of the constitution; they must then be prohibited under every shape and form. Very notably it is forbidden for citizens of the same class or profession "to form regulations dealing with their supposed common interests." [14] Such a corporate law would clearly be directly antithetic to the principle of a unified legislation.

Clearly, the way in which the movement towards association has come into increasing existence involves the disappearance of the concept of law as the sovereign will of the nation. We can no longer accept the theory that its statutes are not laws but the clauses of a series of individual contracts. That is a theory defended to-day only by antiquarians. Those who drew up Le Chapelier's law were in no wise deceived on this point. They saw clearly the way in which the statutes of an association control their members and that is why they forbade them as contrary to the constitution. The law of 1901 on the right of association does of course insist that in theory an association is still governed by the principles of the civil code on contracts and obligations (Art. III,

[14] Article 2 of the law of June 14, 1791.

tit. 3). This is merely a legislative error. And it is worth noting that the law of 1901, which is the antithesis of individualism and derived from an evolution fatal to individualism, was drawn up by men who invoked at each stage traditional principles. It is a new proof, amid a thousand others, that the intimate thought of the legislator fails to seize the spirit of that rule of life of which his own statute is yet a part.

The statutes of an association are not the clauses of a contract, but a definite law. I cannot here enter into the technical implication of this. But the broad lines are clear. The contract of Roman law, adopted by the Napoleonic code, is entirely an individualist conception. It implies two declarations of will, each with a different object in view; these declarations come after an agreement by which they are mutually determined. The psychological character of a contract is clearly envisaged by any one who studies the formula of stipulation in Roman law. But when several wills come together without prearranged agreement, when they have the same object without being mutually determined but with a common purpose in view, it is not a contract that they make. We have what is to-day termed common action in collaboration, what the Germans call *gesammtakt, vereinbarung;* we may use the word contract, but we use it in a sense quite different from its original meaning.

In forming an association there is no contract because the members, in view of their common purpose,

all will the same thing. Their declarations of intention are not mutually determined, they simply concur in a common end. There is no agreement of will between the thousands of persons who may belong to the same association without knowing each other.

On the other hand, contract always gives rise to what is called a subjective legal situation. In these technical terms contract creates a concrete and immediate bond of law between the two contracting parties of whom one must do something and the other can command the doing of it. The situation is entirely individual; it binds these two persons and no others. It is a well-known principle of the civil law that agreements only affect the contracting parties. The situation is, moreover, a temporary one; when the debtor has fulfilled his obligations the bond of law ceases to have any existence.

The statutes of an association do not create a subjective legal situation, they permanently govern the administration of the group. Its members are definitely bound by certain obligations, as, for instance, the obligation to pay their subscription. This obligation is not born from contract.[15] It is the result of joining the society which involves submitting to its regulations. The obligation to pay the subscription is thenceforward a legal obligation entirely analogous to paying one's taxes. He may have to pay it even when it is raised in amount if the general assembly

[15] [For the different attitude of the common law, *cf.* Laski, The Personality of Associations, 29 Harv. L. Rev., 404.]

of the association so decides, and that despite his opposition. He can of course resign from the association; he always owes his annual subscription, and even more, if the rules so decide.

The rules are a real law also in that they settle the purpose of the association; and by setting its purpose they settle its legal capacity. The law of 1901 rightly made its purpose the essential element in the association. The third article gave legal existence to every association with a legitimate purpose. The sixth article permitted every association of which the purpose and formation were declared and published to acquire such immovable goods as were necessary for the accomplishment of its end. Since this end is determined by its rules, they form an organic law.

Nor is this all. The association has a legal capacity which can be exercised only by organs; these are formed by the rules which determine simultaneously their competence. Here, again, the pressure of a real organic law is obvious. Every act done in violation of the rules, for example, without the approval of the general body of the association, where that is necessary, or by the president alone, when the co-operation of the directors is demanded, is null and void. This nullity can be brought into play not only by the society but also by third parties. It is thus impossible to say that the rules are the clauses of a contract. On the contrary, they are above all a law. They are a general permanent regulation the violation of which will be declared illegal by the courts.

This is true of all associations, even of those of a public character. Their end is not determined, and their agents are not instituted, by the decree of recognition. These are to be found in the rules: "They (associations pursuing a public purpose) can do every civil act which is not prohibited by their rule" (Art. II, Sec. 1). The decree of recognition only proves the rules which remain as the organic law of the group.

Positive French law, like most legal systems, distinguishes the association from the civil or commercial company. The company is formed for purposes of gain. The association has a disinterested end in view. I cannot here discuss whether this distinction is well founded. In any case, the fact that the members of a society do or do not pursue an end that is profitable, while it may explain the slow advent of freedom of association and the retention, even to-day, of certain restrictions that are without justification, can have no influence on the nature of these rules. Like the rules of associations, those of a company are real laws which determine its end and its capacity, create its organs, regulate its operation and thus determine the conditions under which its transactions will be valid. This may not be important for a small company; but it is of capital significance for the great organisations of which the number and importance are growing from day to day.

Every modern country, and very notably France, is a mass of groups. We have associations, federa-

tions of associations, trade unions, federations of trade unions, financial companies, industrial companies, mining companies, insurance companies, public contractors. Each constitutes a social group with its own law of life. The theory of the modern state is therefore compelled to adapt itself to the existence of these powerful groups. It must determine a method of their co-ordination. It must settle their relations with the government that exercises public power.

It is the gravest of problems. Certainly it cannot be solved by maintaining the traditional notion of sovereignty and statute. Conservative thinkers have believed that it was possible to prevent a formation and development of their groups. Until 1867 governmental authorisation was necessary to the formation of a limited company (*Cf.* English Companies Act of 1862). The right to form trade unions was granted in a limited fashion in 1884. It was not till 1901 that any general freedom of association was established; and even then a system of limitation was erected. But erected in vain. The movement towards association swept everything before it. Group after group was formed despite the anathema of the impenitent individualist. The collectivist answered that the state would absorb these groups. He saw in the trade unions only an instrument of war in the class struggle which could lead to the nationalisation of the great capitalist societies. It was an error not less great than that of the individualists. It found its root in the same imperialist conception of

public laws, the same notion of an all-powerful state exercising unlimited command over a million of individuals. At bottom the collectivist system is only an extreme form of the imperialist theory.

The facts made havoc of these theories. Prophecy may be a dangerous adventure, but the immense development of group life in every field of social activity seems so general, so spontaneous, and so characteristic of our time as to demand the admission that it contains at any rate the elements of the social organisation of the future. Already our law has ceased to be based on the idea of a unified and indivisible sovereignty. It is and it will be an objective law of government; but it is the law of government which does not command. It is the law of a government which serves the public need and secures the co-ordination of the modern corporate life.

V

The next phenomenon we have to discuss reveals even more completely the collapse of the old conception of law. Statutory agreements are in their nature simple enough; they are laws properly so called, general regulations of a permanent character which settle for an indeterminate length of time the situation of individuals and determine capacity under the ægis of a legal sanction. They are not the work of a unilateral will which commands. They are not the work of a collaboration of wills like the rules of an

association or a decentralised public service. They are the work of wills which really form an agreement. The word contract is often used to describe them; but since that has a technical meaning in the civil law it is better to use the term agreement. The agreement is formed between two or more groups. It creates a set of rules which applies not only to those who belong to those groups at the time when the agreement is made but also both to those who will later belong to them and to third parties who do not belong.

A statutory agreement is not a new phenomenon in the history of law. It is of course absolutely antithetic to the imperialist notion. If law is by definition the command of a sovereign power, it cannot possibly be at the same time an agreement; the two terms are mutually exclusive. That is why statutory agreements have made their appearance in legal history at times such as the feudal period when the idea of sovereignty as the *imperium* of the state was in some degree submerged. I pointed out earlier how the Roman conception of *imperium* declined without disappearing completely and how the feudal system, being based above all on a régime of contract, created between men a series of reciprocal rights and duties. The king as suzerain superior was charged with the assurance of their fulfilment, because it was his business to secure peace by means of justice. No society was more strongly intrenched than the French society of the thirteenth century, despite the violence

that disturbed it; for no epoch—and the twentieth century no more than any other—has been able to free itself from violence. Feudal anarchy and feudal barbarism have become *clichés* we no longer use. The fact is that the feudal régime was essentially both legal and contractual.

It is to-day quite clear that many social relations are governed by rules which emanate not from a unilateral will but from contracting purposes. Now since this same phenomenon was produced in that feudal period when the notion of sovereignty had almost completely disappeared, it may be urged that the renewed appearance of statutory agreements is so significant as above all to make clear the changing nature of the state. Wide enough already, its domain every day extends; it has basic elements which, while they are distinct because they apply to different situations, each display very clearly the combination of statute and agreement. The first type is the collective labour agreement and the second the delegated operation of a public utility. The collective labour agreement is, it must be admitted, a legal institution still in process of formation. It intervenes between the employing groups and the workers to determine the conditions under which the individual contracts in the industry concerned should be arranged. As a rule, it arises out of a strike and puts an end to it. But often enough the problem of its interpretation soon raises new difficulties. Students of the civil law have tried to give it a theoretical basis by applying to

it the classic concept of mandate, but they have failed. The Société d'Etudes Legislatives appointed a commission which, despite the ability and knowledge of its members, was compelled to give up the proposed statute it had attempted to formulate;[16] and the Chamber of Deputies has not ventured to begin the discussion of the two proposals that have been laid before it.[17]

The failure of the society's commission is not astounding. It tried to apply the traditional conceptions of individual contract and the mandate to an act which is, in reality, not a contract at all but the establishment of a permanent rule governing individual contracts that are still to be made. Collective labour agreement can reveal neither its value nor its implications until the employers and the workmen in any given industry are so strongly organised both in structure and numbers as to make the trades concerned almost a legally organised body. It is then that the collective agreement will so regulate the relations of capital and labour as to be the law of an organised profession. It will thus achieve the coordination of classes by a series of collective contracts—by a series of agreements between the different groups in which each class is integrated.[18]

It is difficult to say when the evolution will be ac-

[16] Bulletin de la Société d'Etudes Legislatives, 1907, pp. 180, 505, espec. the report of M. Colson.

[17] Bill of M. Doumergue, July 2, 1906; Bill of M. Briand, July 11, 1910.

[18] [*Cf.* the underlying conception of the Whitley Reports.]

complished, but its gradual development is perfectly clear. Until that development is complete, the intervention of parliament will serve no useful purpose. In any case, the condition of its efficacious intervention is the absence of any individualist notion of contract or mandate. It must be inspired in its action by the idea of a law of conduct based on agreement and applied to the relations of two social groups.

VI

There is another domain, however, where statutory agreement has a perfectly defined character. The courts have often already, perhaps indeed unconsciously, drawn important conclusions therefrom. I mean where a public authority confides some business to a private contractor.

In such an agreement the public authority, whether state, province, town or colony, charges a private citizen, as a rule a company, with assuring the operation of a public service under certain determined conditions which are comprised in a deed called its charter. The company accepts the task and this concession has the same general character all over the world. The subjects of such a concession to-day are for the most part those of transportation and lighting.

Such a concession is a definite agreement. It is preceded by negotiations which lead to an understanding between the administration and the company which takes charge of the work. It comprises

a number of clauses of a contractual character which give rise to a subjective legal situation; the relation between the public authority and the company being thenceforward the relations of debtor and creditor. Some of these clauses deal entirely with the relations of the two parties; others contain material which would not be agreed upon if the public service were directly managed by the state. Such, for example, are the financial clauses which we find in almost all these charters—clauses which deal with grants in aid or with the guarantees of interest or with reductions promised by the company or with the division of profits. All these clauses, and others of a similar nature, are regulated by the rules of the civil code dealing with contracts; since they are effective only for the contracting parties, they are in fact statutory conventions.

But, in reality, such clauses are the least important part of the charter. Most of them are of an entirely different character. Most of them deal with the conditions under which the public utility shall be operated. If, for example, it is a railway or a tramway service, the agreement settles what lines are to be controlled and operated, how many trains shall be run, how the safety of the employees and travellers shall be secured. Other clauses deal with the conditions under which the public may use the service provided; the price of tickets, the gas rate, the electric light rate. In most charters there are clauses which settle how many hours the company's servants shall

work, the minimum wage they shall be paid, the conditions of employment, and the organisation of a pension fund. Such charters give the service concerned practically a statutory organisation. In France by the Millerand decrees of 1899, clauses dealing with the maximum hours of work and the minimum wage must be inserted in all state contracts and may be inserted in those made by departments, communes, and the different public offices; and in most of them they are so inserted.

Such clauses have less a contractual than a legislative character; they are the statutory basis of the service concerned. Were the service to be managed by the state directly, all such matters would either be settled by statute or by administrative regulation. No one would then deny their inherent statutory character; but the mere fact that they are inserted in a charter can not change their character. They still remain general regulations which any person, either directly or indirectly interested in the service, can bring into operation. That would not be the case if these clauses were merely contractual. Such a contract is effectual only between the parties to it. We are compelled, therefore, to call them statutes; but because they are established after an agreement between the government and the company they are really *"lois-conventions."*

Clearly statute, therefore, is no longer conceived as the sovereign command of the state. Its strength derives from the fact that it is to serve the public in-

terest. It organises the fulfilment of a public need. When the organisation and functioning of a public utility are regulated by a unilateral act of the state its statute remains unilateral. But when, as with a public utility, confided to private enterprise, its organisation and functioning are settled by agreement, the statute which settles its situation is a statutory convention. It is nevertheless still a statute with all the characters of a statute, above all its character of a general regulation to which a legal sanction is attached.

VII

This is not mere theory. The decisions of the Council of State are beginning little by little to recognise in the clauses of such a charter a statutory convention. The terminology of the court and of the Department of Justice is, indeed, still uncertain and inexact, in that it reveals on occasion the persistence of the contractual idea. But the phrases matter little; the real fact is that the decisions definitely imply the recognition that such charters are legislative in character and the evolution I have described is thus sanctioned by the highest authority. If such a charter is a statute, with the legal sanction that attaches to statute, it follows that every administrative act done in violation of it must be void and every person affected by that act can attack it before the courts. This is actually what has happened in the cases.

I have already cited the Storch cases of 1905, in which the Council of State admitted the plea that the prefect could not permit a tramway company to perform an *ultra vires* act.[19]

It must be said, however, that the real problem in this decision was not so much the violation of the charter as the police power of the prefect.[20] In the following year the Council of State accepted the plea of an association of land owners and taxpayers against the decision of a prefect of the Gironde who had refused to compel a company to operate a certain line in conformity with its charter. Though the decision bears marks of hesitation, it opened up a new path.[21]

In 1907, the Council of State, acting on the conclusions of M. Teissier, of the Department of Justice, admitted a statutory character for the clauses of the charters of the great railway companies.[22] Finally in 1912 in the Marc case the Council of State finally settled that every charter has a legislative character. The lighting service of Paris is settled by a regulation affixed to the municipal budget in accordance with the charter voted by the town council and approved by decree of 1907. By a decision of 1908 the prefect of the Seine decided that the provision of lighting for private streets and land thereto adjoin-

[19] Chap. II, § vi, supra.

[20] Recueil, 1905, p. 117.

[21] Recueil, 1906, p. 961; Sirey, 1907, iii, 33.

[22] Recueil, 1907, p. 820.

ing should be made under different conditions from those for public streets and the land by the river. The President of the Associated Chamber of Paris Landowners went to the courts on the ground that the charter, a law of service imposed on the administration no less than on private citizens, had been violated. The Council of State accepted the plea and decided in substance that the decision of the prefect of the service was in violation of the charter.[23] This surely can only mean that the charter is a statute; for an action of *ultra vires* is a good plea only when a statute has been violated.

The actual decision, no less than the governmental note upon it, is somewhat confused; the court still speaks in terms of contract and does not admit that the charter is really a statute controlling a public utility. If it is a contract, it is inexplicable how private citizens who are not parties to it can take advantage of it. It is surely curious to annul an act on the ground that it violates a supposed contract at the request of persons who have no connection with it. The contradiction is clearly recognised in the governmental note in the decision: "in pure theory the argument of the town is certainly right;" that is to say, the plea of *ultra vires* is unacceptable. M. Jèze has rightly pointed out how involved are the implications of such an attitude: "The government," he says,[24] "believes that in pure theory the plea is bad,

[23] Recueil, 1912, p. 75; Revue de Droit Public, 1912, p. 43.

[24] Revue de Droit Public, 1912, p. 46.

but we cannot condemn with energy a theory which finds favour with the Council of State. That court in fact must accept, with the great majority of modern writers, the theory that the charter is not a contract. Only in that event can its decisions, unquestionable in their result, be right in their theory. No theory is good that does not fit the facts; the Council of State recognises that its theory is unworkable; let it change it." M. Jèze is profoundly right; the theory is only the hypothetical synthesis of the facts we are given. If one only of those facts does not fit the theory, it must be discarded for a more adequate one.

VIII

From another point of view the non-contractual character of the charters of railway and tramway companies is apparent. It is doubtless true that some of its clauses, like those dealing with finance, create a subjective legal situation, and are thus contractual. But that is not the case with the clauses which deal with the operation of the service. The government has the power to modify them by its own act, which would not be the case if the relationship were one of contract. Nor is that explanation adequate which finds the source of this power in the fact that there is a contract but that it is made with the state. It is a dangerous sophism of which the result is to give a legal basis to arbitrary public power. Contract means one thing and one thing only. It means the

same thing in public law as in private. The financial clauses are contractual, and neither of the parties can modify them, even if an indemnity is offered.

That part, however, of the charter which is a statutory convention and governs the operation of the service cannot be completely withdrawn from the action of the administration. It is not to be forgotten—it is the fundamental idea of modern public law—that the first function of government is so to respond to the public needs as to satisfy the economic situation of the country. Government cannot abdicate that power; it must therefore modify in the public interests the means by which a public utility even in private hands is operated. When it does that, it does no more than fulfil its duty even when it thereby increases the cost of operation. Nor can its decision be attacked as *ultra vires*. It does not give rise to a subjective legal situation; what it does is simply to modify the legal régime under which a given public utility operates.

The Council of State has often recognised this governmental power. In a case already cited it decided that the governmental ordinance of 1901 was not *ultra vires* because it increased the burden of the great railway companies which were operated under the regulation of 1846.[25] The court has decided similarly in nine decisions relative to the decree of the prefect of the service which imposed on the company which ran the metropolitan railway certain obligations for securing the safety of passengers heavier

[25] Recueil, 1907, p. 913; Sirey, 1908, iii, p. 1.

than the charter had originally contemplated. Similarly in 1910,[26] it upheld a decision of the prefect of the Bouches du Rhône increasing the cost of operation of the Marseilles tramway company.[27]

What can be done by ordinance can obviously be done by formal statute. This was clearly recognised by the Minister of Public Works in the memorandum to the scheme relative to the union of railways and waterways of 1908 which notably modified the system of railway transportation. The Chambers have also implicitly recognised it when they voted the pension laws of 1909 and 1911, despite the protest of the companies involved.

One question remains. When government, by its unilateral decision, modified the conditions under which a public utility is privately exploited and makes them more onerous, has the private company a right to compensation? In the decision cited above the Council of State has decided in the affirmative; as was implicitly recognised by statute in 1908. The Council of State has not hesitated to recognise and to sanction under the principle compensation for the new burdens the state has imposed. It appears to have based its action on the theory that the charter is a contract. Such an argument is in fact contradictory; for if all the clauses of the charter are contractual, the administration, even when it pays compensa-

[26] Recueil, 1910, p. 97.

[27] Recueil, 1910, p. 216; Revue de Droit Public, 1910, p. 270.

tion, ought not to have the power of unilateral modification.

The truth is that the real idea involved is that of the responsibility of the state. A public utility is operated in the general interest. If its operation results in special damage to interested parties, the national exchequer ought to make the reparation. In the case discussed, this explanation clearly fits the facts; the state is simply responsible for the special prejudice it has caused in the public interest. But I shall discuss the notion of responsibility in a later chapter.

However this may be, it is clear that the clauses of those charters which regulate the operation of public utilities are definite statutes, even though they are established as the result of an agreement between the government and a private company. They are statutory conventions and clearly show how the imperialist theory of the state is passing away.

CHAPTER V

ADMINISTRATIVE ACTS

SIMILAR and parallel evolution may be observed in relation to governmental activity. The imperialist system regarded governmental action as unique in that it was a manifestation of sovereign authority. Governmental action is undoubtedly different from statute in that the one is the act of an individual official, the other of a parliamentary order. This distinction was not always perceived. It was customary to see an administrative act in every order of the executive power or its agents, whether an ordinance, an individual decision, or even the performance of a simple menial task. Those were "administrative acts of some sort or kind" of which the Act of Fructidor 16th of the year III speaks. There was no question, of course, as to action by the courts; no analysis was made of the character proper to judicial functions.

A judicial power which belongs to the courts has been instituted. All acts which emanate from them have a judicial character just as all acts done by the agents of the executive are administrative acts. For those agents, however different their situation may be, the fundamental fact remains that they possess a

common character due to their relation to the executive; they have some measure of public authority. They can, of course, intervene only within the limits of statute; but whatever they do has a certain sovereign character, and cannot therefore be dealt with by the courts whose competence is limited to the acts of private citizens. The Act of Fructidor already cited is as general and formal as possible on this point: "The courts are strictly prohibited from taking cognisance of administrative acts of any kind."

The imperialist conception of an administrative act is thus simple. Since it is the act of a governmental official, it escapes the control of the courts. It is easy to imagine how this would impress the average citizen; and indeed the French mind has still a sort of superstitious terror in the faith of government, a terror which it retains even though the character of sovereign power has little by little disappeared. The administration, indeed, still retains a special character; but this character is not derived from a supposed sovereignty without limit. The nature of an administrative act is not derived from its origin but from its purpose. It is still an individual act done for a public end.

This is a transformation exactly similar to that of statute. A statute was a general order derived from a sovereign will; it has become a rule established to supply some public need. An administrative act was clothed with sovereignty because it was an act of the agent of the executive power; it has become the act

of an individual of which the character is derived solely from the end it serves.

I

Naturally this transformation has not been completed in a day. It is the product of a labour now almost a century old, and the theory that has gone to its making is of sufficient interest to deserve more than passing mention. A theoretical distinction has been made between administrative acts done under the cloak of sovereign power and the mere fulfilment of orders by a government servant technically unrelated to sovereign authority. This distinction was first formulated by M. Laferrière in his great book which appeared in 1887[1] and marks a fundamental epoch in the evolution of public law. But the theory was based upon an earlier preparation and came into being through a cause entirely strange to the problem of the real nature of administrative acts.

I pointed out in the beginning of this chapter how, from the sovereign power attributed to every administrative act, it was concluded that no authority, not even the courts, could pass upon the legality of administrative action. The constitution of the year VIII indeed has given the Council of State the task of "solving difficulties which arise from administration." Certain consular and imperial decrees[2] had

[1] Traité de la Jurisdiction Administrative.

[2] Consular Decree of 5th Nevôse Year VIII; imperial decrees of June 11 and June 22, 1806.

given it an organisation; and Napoleon created a commission to prepare reports for the general assembly. Such was the beginning of the Council of State as a court.[3]

Despite these powers, the Council of State, in the traditional phrase, exercised only an indirect justice; even in semi-administrative questions it only gave advice; and the decision always remained with the government. With both the legality and the results of executive action the government continued to deal. Prefectoral councils were created in the departments and were given an extensive judicial power of passing upon administrative acts; but their courts were always composed of administrators, nominated and dismissed at the will of government. They thus presented no guarantee of indifference and capacity; and the fact that these deliberations were conducted under the presidency of the prefect, an immediate agent of the government, made them useless.

Under these conditions a twofold movement grew up. On the one hand it was urged that the special administrative court should be abolished and every case submitted to the control of the ordinary courts; on the other hand legal theorists tried to limit the number of cases where the intervention of an administrative act should withdraw the problem from the control of the ordinary courts. The means by which

[3] [On the council of state and its organisation, *cf.* Hauriou, Précis de Droit Administratif (8th ed.), 229f, 968f. For its history, *cf.* Laferrière, op. cit. i, 137–301.]

this result was to be attained was to make a distinction between different administrative acts.

The first tendency was originally expressed in an article by the Duc de Broglie in 1828 (Revue française, March, 1828). From that time till 1872 the suppression of administrative courts remained an essential article in the liberal program. But the movement came to nothing. Again in the name of the great commission on decentralisation in 1872, M. Lefevre Pontalis wrote a long report urging the suppression of prefectoral councils and the transference of their functions to the ordinary courts;[4] but the National Assembly did not vote upon the proposal and the Councils still exist. By the act of May 24, 1872, the Assembly recognised the Council of State and gave it full judicial control with the widest powers. It was to deal as a sovereign body with every case in which the administration was conceived.

The administrative courts were thus retained. The movement, indeed, for their suppression was bound to fail for many reasons. In the first place, the belief that the administrative act is clothed with the sovereignty incarnate in the executive power remained too strong; and the deduction was made that the executive alone could thus judge the validity of its orders. To give such power to the courts seemed a flagrant violation of the separation of powers. On the other hand, in men's minds there unconsciously

[4] [This is still a great problem. *Cf.* Jèze, in Bulletin de la Société d'Etudes Legislatives, 1910, p. 25.]

penetrated the idea of public service. They began to see the intimate bond between the administrative act and the response to public needs. They had a marked repugnance against allowing the ordinary courts to concern themselves with these questions.

Nevertheless the movement towards suppression has had considerable result. The Act of 1892 has not only made the Council of State a sovereign jurisdiction; but the learning and the impartiality of its members has made of it a power which inspires an unlimited confidence.

Alongside this legislative evolution legal theory has had to find a system which, harmonising the confused and often contradictory decisions, should maintain unbroken the principle of administrative separation, while defining and limiting its extent.

The beginning of this theoretical construction goes back to Merlin and Locré. In the year XII, Merlin powerfully protested against the effort under the Act of Fructidor 16 of the year III to take from the ordinary courts all cases derived from contracts.[5] In his work on French Legislation and Jurisprudence (1810),[6] Locré maintained the same opinion. In the classic works of Aucoc, Ducrocq, Batbie, and Dareste, a clear effort is made to distinguish two categories of administrative action of which one only gives rise to the need for special administrative courts.

[5] Questions de Droit, V° Pouvoir Judiciare (1829), vi, p. 306.

[6] At p. 166.

The climax of this doctrine is in M. Laferrière's work. He divides administrative acts into sovereign and non-sovereign; and only the former demand in principle the special administrative courts.[7] The mass of these cases form what is termed the natural administrative law. On the other hand, non-sovereign administrative acts come in principle within the sphere of the ordinary courts. They should be brought before the administrative courts only by the expressed provision of statute. Such cases form what is called statutory administrative law.

The understanding of this is essential to a perception of the direction of modern political theory. The distinction between sovereign and non-sovereign acts comes from the desire to limit the judicial power of the administration. Viewed from this standpoint, it had for a short period a very curious history. It was urged that it dominated all public law and was universally applicable. The attempt to extend it revealed at once its futility and the real character of administrative law.

II

It is not sufficient to make a distinction between the two divisions of administrative acts; it is necessary also to define the character of each and the criterion by which they may be distinguished. This was no easy task. General and vague formulas it was of

[7] Jurisdiction et Contentieux (1896).

course easy to find; but a precise analysis was in the highest degree difficult.

M. Laferrière was satisfied with a very general formula: "A double task," he says,[8] "is allotted to administrative authorities. On the one hand they manage the public funds, collect them and apply them for their different purposes. In the fulfilment of this task they perform what is called non-sovereign acts; on the other hand, the administration is charged with an authority which is one of the attributes of executive power. It is its business to execute the laws, to operate the public services, to secure for citizens the benefits of a system of justice. . . . The administration then acts in an authoritative character, and what it does it then does as a command, as an act of its sovereign power."

Despite the vagueness of this statement, M. Laferrière's authority was too great for it not to be accepted with unanimity. It was affirmed in every book and there was no law school that did not teach it. Yet, as a formula it hardly possessed the clearness and precision that a legal principle demands. This defect M. Berthélemy tried to remedy in his admirable book on administrative law. He postulates as a dogma the distinction between sovereign and non-sovereign acts. A practical criterion for distinguishing between them he describes as follows: "Non-sovereign acts are acts which any person may do in the administration of a private fortune because

[8] Jurisdiction et Contentieux (1896), p. 6.

they do not imply the existence of sovereignty." [9] Nothing could appear more helpful or more precise.

It has been suggested that this principle enables us to solve all the problems of public law. It has been held to contain the distinction in principle between natural and statutory administrative acts. Not only is it urged that the state is responsible simply for non-sovereign acts and never for sovereign acts, save where that responsibility has been established by statute; but the problems connected with the civil service are, so we are told, capable of solution by its means. Civil servants who perform sovereign functions are, it is claimed, appointed by unilateral act of the state; they cannot form trade unions or professional associations; they cannot strike. Civil servants who perform non-sovereign functions are in the same positions as private agents. Their relationship to the administration is contractual. They can go on strike and they can form trade unions in so far as their functions enable us to analogise them to the ordinary workman.

For some years this has been the general trend of doctrine. But even in the precise form that M. Berthélemy gave it the distinction was still vague enough. There is no one administrative activity that some time or other has not been performed by a private citizen and cannot to-day be conceived as being capable of such performance. It is clear that the Council of State, in determining the capacity of administrative

[9] Traité Elémentaire de Droit Administratif (7th ed.), p. 139.

jurisdiction, pays no regard to the distinction between sovereign and non-sovereign acts. Nor is it less clear that the responsibility of the state is involved when a private citizen suffers from the act of such a service as that of police which, if the distinction be accurate, would obviously be sovereign in character. Finally, and above all, the syndicalist movement in the Civil Service has shown clearly that the proposed distinction would lead to impossible consequences. It would involve the recognition of the right to form a union with the implication of adherence to the C. G. T., for almost all the Civil Service and the admission that they may go on strike. But this is in complete contradiction with the very idea of service and public duty.[10]

These facts speak for themselves. M. Berthélemy alone has remained faithful to a distinction which it is impossible to maintain. In his very able argument in the Feutry case, M. Teissier, as counsel for the government, demonstrated conclusively its impossibility. "This distinction," he said, "has no legal basis and at no point corresponds to the facts at issue. The truth is that every state act performed to assure the operation of public services involves the application of statutes and administrative ordinances. . . . We may therefore say that neither the state nor its officials ever act in the same situation as a private citi-

[10] [See, on the other side, J. Paul-Boncour, Syndicats de Fonctionnaires (1906); M. Leroy, Syndicats et Services Publics, 1909.]

zen." This ably puts the essential point. Administrative intervention must always differ from private action because the end it has in view is different. It aims simply at the legal response to public need.

III

That is not, however, to say that the government always intervenes in the same way. Its action varies according to the circumstances of the case, even while the principle involved is constant. This is demonstrated by the consequences of its action.

Sometimes administrative acts result in a subjective legal situation where the government or the private citizen undertakes a definite obligation. We have then a declaration of will from a public official the object of which is to create for the purposes of a public service a subjective legal situation. Such a situation is the synthesis of the general elements of a legal act. We have first a declaration of will: necessarily, that declaration must conform to the objective law, and since the day we may always equate objective law with legislation, it may be said that the announcement of official purpose must base itself upon statute. Some acts are by their nature beyond official power. On the other hand, the official is legally limited to a definite field and within this field to definite purposes. This is called his capacity. Any purpose outside his capacity is *ultra vires*.

The second essential element in every legal act, es-

pecially in every administrative act of a legal kind, is the end it has in view. This element is coming more and more to be of decisive importance. For an official act to be legal it is essential it should have in view a socially valuable aim in accord with the objective law of the country in question. Metaphysical considerations apart, every act of will has a motive behind it and the value of every administrative act is the object it has in view, which can only be a regard for the public service. Any other motive involves an abuse of power; if the motive is good, but beyond the capacity of the agent, there is a misuse of power.

Abuse and misuse of power are two legal theories directly connected with the idea of the end of law which are becoming daily of increasing importance.[11] In private law the change is precisely similar.[12] For a long time the Civilians considered only the result of an act of will. It is of course true that in the Code Napoleon (Articles 1131-1133), will was placed under the title of Cause; but the highest authorities agree that cause in fact plays no part in the birth of an obligation. We have now a whole line of cases which, to the great astonishment of the classic authorities, make the element of purpose and its social value of the first importance.

The fundamental thing is not the character of the agent who acts, it is not the result that he achieves, but

[11] [*Cf.* Prof. Dicey's comment, Law of the Constitution (8th ed.), p. 394f.]

[12] *Cf.* Duguit, Les Transformations Générales du Droit Privé (1912), p. 52 seq.

the purpose that determines his act. If an administrative act produces certain special effects, it is not because it is derived from a special will with special powers. As a matter of sober fact, it is derived from a will no stronger than any other will; but the end it has in view gives it a heightened force in value.

This end must be public in character. If in public law a legal result is often produced by a similar act of unilateral will, it is because the declared purpose of the agent, who is simply an individual like any other and has no special superiority in himself, is determined by the end he has in view—the public service. A unilateral administrative act has been called sovereign in character, because, in accord with the current imperialist and individualist theory, it was not imagined that the legal situation could be created without a contract, or at least that a will more powerful than other wills could create by its own force a legal result.

If many administrative acts are unilateral, many are also contractual. When an official and a private citizen agree, the contractual declaration is the basis of the administrative act. Acute search has not discovered a criterion by which to say when the administration can act unilaterally and when in contractual fashion. Every situation needs its separate analysis, and all that can be said is that the tendency of public and private law to-day is the diminution of the sphere of contract and its replacement by unilateral activity. This tendency is connected with what I have called

the socialisation of law on the one hand and the growing importance of the purpose of law on the other. The two movements are essentially connected.

Since the act of an official derives its force and its consequence from the public end it is to serve, it may be asked why it is necessary to inquire when the determination is unilateral or contractual. It derives its nature from the end it serves. This in itself shows how administration has become subject to law; it shows also in what fashion the theory of the state is changing. That is why the border line between public and private law is becoming, more and more perhaps, the fundamental aspect of modern law. It of course appears under different aspects as the act from which it arises is different. But every administrative act has one common character: the question raised by every administrative case is the question of knowing whether the act had in view a public need and conformed to the organic law by which the service corresponding to that need was operated.

This explains the disappearance of the traditional theory that the administration cannot be bound by its unilateral acts. This was simply a deduction from the supposed sovereignty by which the unilateral acts of the administration were distinguished. But, as soon as it is, on the contrary, seen that an administrative act is a legal act, and creates a legal situation, it is clear that whether contractual or unilateral it is beyond the reach of the administration either to suppress it or to modify it. When the administration

repeals or changes an act it is simply because this act has created no obligation; or at least an obligation that permits of revocation.

Here again, were there need of it, we could infer the elimination of sovereignty. The Council of State has several times applied this theory and its decisions have gone without criticism. M. Jèze has summarised decisions of three cases dating from 1910 and 1911 as follows: "Where a legal act has been completed in accordance with law, it cannot be revoked in the sense of being considered as not having occurred, and being without result. All that can be done is to perform other legal acts with the purpose of putting an end to the legal situations created by the first . . . nor is this always possible. It may happen that the legal act it is desired to recall has created so special a situation that it does not admit of change; in which event any later act is useless." [13]

IV

The character of administrative acts based on the concept of purpose, and the elimination of the idea of sovereignty, together explain why the question as to the obligatory character of the contracts made by the state with its citizens is no longer necessary. It is easy enough to understand the difficulty that confronts the imperialist system. If the state, it may be said, is by definition a sovereign person, it preserves

[13] Revue de Droit Public (1911), p. 61.

this character in all its acts whether contractual or unilateral. As a result, the state cannot be bound by contract because, when it is so bound, its personality would be no longer supreme; it would then cease to be sovereign, since the nature of sovereignty is to be without subordination to any will whatever.

In the imperialist system an elaborate hierarchy of theories has been constructed to justify the attribution of an obligatory character to the contracts of the state. Individualism, of course, can explain it sufficiently well by saying that sovereignty is always limited by the natural rights of the individual. The state therefore can only proceed by way of its contract when it encroaches on the realm reserved for individual rights.

In Germany, the theory of the state as a fiscal person, ably defended in France by M. Ducrocq, has had much vogue. It insists that the state has two personalities, one sovereign, and the other financial, the second being created by the sovereign act of the first. In this conception it is the state as a financial person alone which can be a party to a contract; being non-sovereign, it has the attributes of a private citizen.[14] This theory of a double personality has been keenly criticised by French and German jurists,

[14] Hatschek, Die rechtliche Stellung des Fiscus (1899); Ducrocq, Droit Administratif (7th ed.), iv, p. 11 seq. [*Cf.* the way in which, in England, the crown can be sued on contracts, but not for the torts of its agents. Dicey, Law of the Constitution (8th ed.), p. 556, and Laski, Harv. L. Rev., March, 1919.]

notably by Jellinek and Michoud.[15] The latter has given to this doctrine of personality a twofold implication. Sometimes the state appears as sovereign; it then commands; sometimes it appears as a private person, it then contracts. It remained for M. Ihering to invent, and M. Jellinek to develop, the ingenious theory of auto-limitation.[16] The character of a sovereign will is to be completely self-determining. When the state contracts it consents, by an effort of its own will, to limit itself. But that will, even in so limiting itself, by being thus completely self-determining, remains sovereign even when it submits to contract.

The mere statement of these theories is the evidence of their futility. No one can deny that the state is bound by contract, and this unanimity is evidence that the concept of sovereignty is in process of disappearance. No organ of the state, nor even the legislative body can overthrow its contracts. An act by which the contractual obligation of the state was suppressed or modified would be *ultra vires;* and the courts would condemn the state exactly as if the act had not been made. The old conception of contracts of public law by which the state was authorised to withdraw from its obligations has had its day.[17] A contract is a legal act with the same character both

[15] System der Offentliche Subjektiven Rechte (1905), p. 209; Michaud, De la Personnalité Morale, I, 262.

[16] Allgemeine Staatslehre (1905), p. 357.

[17] [It is of interest to compare American experience on this head. Fletcher v. Peck, 6 Cranch, 135.]

in public and in private law; or rather no distinction exists between public and private law and the state is bound by its contracts exactly as a private citizen is bound. It has been noticed that in condemning the state, even when legislative acts try to free it from its obligations, the courts do not pass upon the question of the responsibility that derives from an act of parliament. What they do is to pass upon a contract and on the extent of an obligation which the parliament cannot suppress.

The Council of State gave in 1896 and 1904 two typical decisions on this question. By an agreement made in 1860 between the French government and certain ecclesiastical foundations of Savoy, the latter handed over certain rent charges to France which, in return, under the form of pension, was to give them the equivalent of the arrears. In 1883 the French chamber refused to vote the necessary credits for the payment of the debt. The Minister of Finance was thus unable to authorise the outlay. The Council of State by its first decision of 1896 annulled the ministerial order and enjoined the Minister to liquidate his obligation—that is to say, despite Parliamentary decision to the contrary, the French state was ordered to pay its legally contracted debt.[18] In the debate of December 22, 1899, M. Caillaux, then Minister of Finance, asked for a vote of credit to comply with this decision. He clearly affirmed that the contracts of the state, despite any contrary decision of parlia-

[18] Recueil, 1896, p. 660.

ment, gave rise to an obligation. This decision was upheld in 1904 under similar circumstances.[19] The clear protest of M. Millerand, the Minister of Public Works, in the Chamber against the proposal of M. Jaurès to pass an act which would have freed the state from certain obligations to the Western Railway Co., is, of course, well known.

V

So far the unilateral or contractual activities of the administration have in this discussion been of a legal kind. In its largest sense the term administrative act comprises also the whole series of operations which are incontestably administrative in their nature. They are not, however, legal in character and may therefore be called material administrative acts. The term is applied to the innumerable activities of state officials to assure the operation of public services and particularly those we have called the industrial services like transportation and the telephone system. The number and the complexity of such acts is growing with the increasing complexity of the state. They are not legal acts because they are not performed to create of themselves a legal situation; but since they have in view a public end they fall under the domain of law. Often indeed they are the preparation for a legal administrative act; they constitute the formal conditions by which such an act

[19] Recueil, 1904, p. 533.

becomes valid and thus make part of it. Often again they are the execution of such an act and thus directly related to it. Even when they are neither its completion nor its preparation they are not now legal, because they may involve responsibility on the part of the administration or the civil service to private citizens.

This analysis, if somewhat arid, is nevertheless necessary. What it shows is that if administrative acts have different aspects according to the conditions under which they arise, they have two characteristics in common of which one is negative and the other positive. No administrative act is derived from a sovereign will. All administrative acts are performed by a government official with a view to securing the operation of a public service and must be made conformably with its statutory organisation.

In such an aspect, every element of public law has its connected place in the whole system. A statute is a general regulation which creates, organises and operates some public service. An administrative act is the individual and concrete act necessary to the operation of the service and performed in agreement with statute. Every administrative process, therefore, gives rise to the question as to whether it conforms to the law of the service concerned.

VI

If this is true, the consequence from the point of view of administrative law is clear. An administra-

tive case deals with any question relative to governmental operations. Every case of this kind comes within the jurisdiction of the administrative courts and the nature of the act concerned is immaterial.

The evolution of administrative law is entirely antithetic to what the second half of the nineteenth century seemed to expect and to what M. Laferrière in 1887 and 1896 predicted. In the imperialistic theory, sovereignty appeared in every administrative act; and for that reason the law of Fructidor (year III) deprived the courts of all such jurisdiction. It then became necessary to distinguish between acts clothed and unclothed with sovereignty. That was clearly impossible; and it became apparent that the common character of administrative acts came from their similar destination to a public service. It then became necessary, from the point of view of administrative law, to treat them as identical and to withdraw all alike from the jurisdiction of the courts; so there was a logical return to the system of the year III. But it was at this time that there was established a general administrative competence by reason of the sovereignty implied in every governmental act, just as to-day it has been established by reason of the purposes those acts must serve.

It would be to neglect an important fact not to add that this evolution has been hastened, on the one hand by the ignorance and inertia of the ordinary courts, and on the other by the independence, the learning, and the fine impartiality of the Council of State.

Many of the ordinary courts still stand where Roman law and Pothier stood. It is of course true that some of the courts hand down decisions that are making a new civil law alongside the new public law; but this is either due to the presence on the bench of a few great judges or to the unconscious need of circumstances stronger than the courts. It is indubitable that even the highest tribunals are still impressed by the superstitious fear that administration inspires in a Frenchman and that many are too prone to consider an administrative act as a sacred thing. It is not then astonishing that private citizens should have little confidence in the ordinary courts where their case directly or even remotely concerns itself with an administrative problem; and it was obvious enough that their hopes would be built on the Council of State which, in every circumstance, has found means, more even than in the Court of Cassation, to protect the individual against the arbitrary character of administrative power.

Every question of jurisdiction, therefore, comes down to this: Is the administration involved, or is it not, when an act is related to the operations of government? If it is, the jurisdiction belongs to the administrative courts, if it is not, it belongs to the ordinary courts.

It is perhaps worth while to cite some of the cases which mark the principal stages in this evolution. In 1903 the Council considered a case which arose out of a meeting of a general council, which was

doubtless a unilateral act, but to which no sovereign character belonged. The Council had offered a reward for the destruction of vipers.[20] One Terrier brought so many vipers' heads that he used up and went beyond the actual sum allotted to the department for the purpose. The prefect refused to pay him his due, and Terrier therefore sued the department before the Council of State. The latter accepted the plea on the ground that the general council had organized what was virtually a public utility, which the representative of the government compared to the wolf-destruction of other departments. He acted therefore in a case where the operation of a public service was concerned; and as a consequence the Council was competent to take cognizance of the matter.

The Council of State has always admitted its administrative jurisdiction for cases arising out of state contracts. It used, however, to be said that where the case was concerned with the local authority, jurisdiction belonged to the ordinary courts. To-day the Council of State claims jurisdiction over every case, local or national, where a public contract is concerned. This was clearly settled in the Theroud case in 1910, where the town of Montpelier made an agreement for the removal of dead animals.[21] It was held that, since the agreement had in view the sani-

[20] Recueil, 1903, p. 94; Sirey, 1903, iii, 25.

[21] Recueil, 1910, p. 193; Sirey, III, 1911, p. 17; Revue de Droit Public, 1910, p. 353.

tary security of the population, it was a general governmental act, and in default of a precise text handing it over to any other court, jurisdiction belonged to the council of state.

So far as the venue of simple administrative material acts is concerned, there must always be a doubt as to responsibility. Evolution here is even more characteristic than in the case discussed. The first Court of Conflicts, instituted by the Constitution of 1848, had settled that the administrative courts alone had jurisdiction to deal with the damages that might result from governmental action. It cited the Acts of July 17, 1791, and September 26, 1793, which settled that the government alone could make the state a debtor. As a fact, these acts had no relation to the question of venue; their purpose was simply the liquidation of state debts without recourse to law. The real motive of the decision was not admitted. A beginning was made, not without hesitation, of admitting that the state was responsible for acts arising out of the performance of its functions even while there was a dim feeling that this responsibility violated the hitherto undoubted theory of sovereignty. It was for this reason that it had been desired to keep exclusive jurisdiction for the administrative authorities; nevertheless, under the Second Empire the Court of Cassation several times admitted the competence of the ordinary courts. The question came before the Court of Conflicts which had just been created by the law of May 24, 1872. Damages had

been claimed against the state as the result of an accident to a child in the tobacco factory of Bordeaux. In a decision handed down, after disagreement, under the presidency of M. Dufaure, the Minister of Justice, the Court of Conflicts decided that the case was administrative in nature.[22] But the decision no longer cited the laws of 1790 and 1793. It appealed vaguely to the general principle of separation of powers. It declared that "state responsibility for private damage caused by officials can be governed, not by principles of the Criminal Code, since the responsibility is neither general nor absolute, but by special rules which vary with the need of government and the necessity of harmonising state rights and private rights."

Vague and unscientific as these motives may be, they are interesting because of the evolution they presage. The Court clearly felt the growing sense that the state must be made responsible for its acts even while its responsibility was different from that of the citizen in his private relations. It did not yet formulate, of course, the distinction between the subjective responsibility for fault and the objective responsibility for risk. The definition of this twofold notion came later. But the courts in 1873 realised that state responsibility cannot be a responsibility for fault and that the ordinary courts lacked jurisdiction simply because it is with this responsibility that they

[22] Sirey, 1873, II, 153.

deal. So it should be when the problem is that of a service to which sovereignty is not attached. The decision is fundamental. It tends to rescue for the governmental courts all cases which concern governmental functions; and this, whatever the character of the act or the department in which it arises.

The Blanco case is thus the point of departure of a whole evolution. The ordinary courts accepted it and refused to deal with cases where the responsibility of the state was concerned unless some definite statute gave them jurisdiction. Logic completed what chance had begun. Suits against communes, departments, public offices for responsibility arising from their service, came before the Council of State in the first hearing in the final decision. There was much hesitation; even in 1906 the Court of Conflicts decided that the rules applicable to the responsibility of the state are different from those applicable to the communes. Logic, however, was successful. The idea of public service has become the fundamental basis of public law. However administered, every such service has the same essential character, and there is thus no reason to make any distinction of jurisdiction.

That is why on February 29, 1908, the Court of Conflicts recognised that it could receive a plea against the department. The Feutry case, based on the remarkable conclusions of M. Teissier, as government counsel, completes the evolution that the

Blanco case had begun.[23] Action was brought against the department of the Oise on the ground that it was responsible for the arson of a lunatic who had escaped from the departmental asylum of Clermont. The Court of Conflicts, after disagreement, decided, under the presidency of M. Briand as Minister of Justice, in favour of administrative jurisdiction "on the ground that the claim attacks the organisation and functioning of a service maintained at public cost the appreciation of the faults of which cannot belong to the ordinary courts."

The simple and sufficient reason for deciding that the case was administrative in nature was the fact that it dealt with the operation of a public service. The same answer must obviously be given where the public authority is local and not national; and this has been the effect of numerous decisions since 1908 of every kind of court.[24]

VII

The business of administration is thus the management of the business of the state in conformity with the law. Just as sovereignty has been eliminated from the sphere of legislation, so has it passed from the sphere of administration. The administration of

[23] Recueil, 1908, p. 208; Sirey, 1908, III, 98; Revue de Droit Public, 1908, p. 266.

[24] *Cf.* also the Fonscolombe case, 1908; Recueil, p. 449. See further Revue Générale d'Administration, 1910, III, 194; Sirey, 1911, II, p. 281.

the state is conducted under the control of administrative courts composed of administrative magistrates. Cognisant of the conditions under which it is necessary to operate the state, they afford the necessary guarantees of independence and impartiality. They reconcile the interests of the state with those of private citizens. In this way all administration is a matter of law and controlled by the courts. It is in this service, above all, that the modern state becomes what the Germans call the Rechstaat.

While this evolution is practically true of France, it is not confined to it. The movement can be paralleled in Germany and in Austria, and it is perhaps worth while to outline the general character of this development. In Germany its character has been clearly outlined by Professor Mayer. "The final result," he writes,[25] "is to identify administrative justice with jurisdiction in the strict sense of the word—that is to say, the declaration of the law in its individual sense." "Our starting point," he writes again, "is those cases in French law where the plea of *ultra vires* has been made. This has had some influence, even though it has been hardly understood, on the development of German law. It is derived, like the plea to the Court of Cassation, from the *ancien régime*. Its value has been proved by a long history and it has been brought to a high stage of perfection. . . . In place of this plea, German law provides the demand for nullification where the law is violated." Mayer

[25] Droit Administratif Allemand, I, 210, 247.

then explains that German jurisprudence has not yet arrived at the point where authority could be negatived—a doctrine which, as the next chapter will show, occupies an important place in French law. The different jurisprudence of the United States and of England has made their evolution different. Yet they enter also with the general current of modern law. They tend to organise the judicial control of administrative activity. French influence is apparent in this evolution even though it is only at its beginning. Such control, however, is as yet extremely narrow. It has also been pointed out to us that in England and America every administrative act is subject to the control of the ordinary courts and this system has been urged upon France. This is a misstatement of the issue. In reality so-called cases against the administration in England and America are simply cases against the individual administrations, and as Hauriou justly observes, "the defect is the absence of the two great methods of French administrative law: the annulment of administrative acts on the one hand and the claim of damages from a corporate administrative person on the other." [26] To-day these methods begin to find their place in the common law. Special tribunals are being organised, or rather the ordinary courts are being given special powers, to deal with governmental cases, either where responsibility is concerned, or where the

[26] Précis de Droit Administratif (1911), p. 935, n. 1.

legality of the administrative acts is called into question.

In England the ordinances of the central government can always be nullified by the courts as *ultra vires* when they go beyond the legislative delegation from which they are derived. The same is true of local regulations. Recent legislation has sometimes given to administrative bodies a real jurisdiction for particular objects. This is the beginning of an administrative law and the evolution will be rapid.[27] In the United States the development has gone further. A statute of 1855 established a court to deal with all claims based either on law or contract made against the central government. At first the decisions of this court had not the force of law. They were simply the basis of bills which Congress had to approve. Later the Court of Claims became a real court, the decisions of which became binding upon the Secretary of the Treasury; and appeal from its decisions went to the Supreme Court.

A complicated system of writs enables the American courts to annul the administrative decisions, but they lack the power to examine questions of fact or timeliness already determined in those writs by the administrative authority. "The principle applies whatever be the rank or character of the official to be controlled. However humble he be, once he has a

[27] *Cf.* Dicey, Law of the Constitution (8th ed.), chap. xii, [and his paper in the Law Quarterly Review for 1915 on the Growth of Administrative Law in England].

discretionary power, he exercises it protected from all control. However powerful he may be, he must act in conformity with the law." [28]

In several cases special statutes have expressly given the courts the control over the discretionary power of the administration. Certain statutes, again, have definitely organised the means of protest against the decisions of administrative officials before the Court of Quarter Sessions or before the County Courts which have almost everywhere replaced them. In New York, for example, any interested person may protest before the County Court against decisions of the Superintendent of Charities relative to a home for the poor.

So has been slowly organised the legal protection of the individual against the state. It is an incomplete evolution as yet both in the United States and England; the check on power has not yet reached maturity. The idea of discretion is still powerful in administrative action. I shall show in the next chapter how French law has freed itself from this conception. On the other hand, the fact that the control of the courts belongs as a rule to the ordinary tribunals which by origin and by nature are foreign to the task of administration deprives the private citizen of a guarantee given to him by the French system.[29] The

[28] Goodnow, Principles of Administrative Law in the United States, p. 322.

[29] [Professor Dicey, of course, argues in an exactly contrary sense. *Cf.* the passage cited in the last note but one.]

American courts are, where the executive power is concerned, curiously timid. "For political reasons," writes Professor Goodnow,[30] "the courts have generally explained that they will not exercise their jurisdiction when to do so would bring them into direct conflict with the chief executive." There is no doubt on this head where the president is concerned; and the same appears true of the Governors of the different states. This progressive evolution of French administrative law was strikingly affirmed at the Congress of Administrative Sciences held at Brussels in August, 1910. It became there apparent that no modern public law so completely protects the private citizen as the French. France leads the way in private as in public law. In private law, the cause is the antiquity of its code which after more than a century, allows its lawyers and its courts to free themselves from the bonds of too narrow an interpretation. In public law the cause is twofold. In the first place, it has no code at all. In the second place a Council of State, in origin and procedure an administrative court, in independence and impartiality, is like an ordinary court. The two elements have combined to create a body of law providing the fullest protection to the private citizen.[31]

[30] Op. cit., p. 323.

[31] [Professor Dicey's citation of De Tocqueville's adverse opinion is here of interest. Œuvres Complètes, I, 174–5. L'Ancien Régime et la Révolution, p. 81.]

CHAPTER VI

THE BORDERLINE OF ADMINISTRATIVE LAW

ADMINISTRATIVE law is, however, more complex in nature than the preceding chapter has suggested. The part it has followed and the transformation it has undergone are worth discussing for the light they shed on the change in public law.

I

The imperialist theory of the state corresponds to the individualist concept of private law. It considers the state as a possessor of sovereignty which is manifested, not merely in law, but also in administrative acts. Private law conceives of the individual as the subject of a certain number of rights which are synthesised into the two rights of liberty and property. We are always, that is to say, dealing with the state that possesses the subjective rights of liberty and property. The state could not touch either of these rights; or at least it could limit them only to a fixed degree and under certain conditions. In such a system, therefore, every administrative case fundamen-

tally gives rise to the question as to whether the subjective right of the individual has or has not been attacked by the state, in its administrative activity, beyond its legal limits. Every administrative case thus poses a question of subjective right.

Administrative law is thus exclusively subjective. For the government, the question it raises is the limit of sovereignty. For the private citizen, the question is whether the subjective rights of liberty and property have been violated. Every case, that is to say, leads to the recognition of a subjective right either of the government or of the private citizen, and must consequently end in the condemnation of one or the other. This is what was meant by Ducrocq when he said that in order to have a natural administrative law "the case must arise through an administrative act in the technical sense and the claim based upon it must arise from the violation of a right and not simply through the violation of an interest." [1]

No one can read the decisions of the Council of State without seeing that for many years that court has given two kinds of decisions, to all seeming entirely different. In some, the Council annuls the administrative act or refuses the annulment. In others there is annulment accompanied by the condemnation of penalties against a private citizen or the government. If there are two such different categories of decisions, there are surely two categories of cases.

For a long time, indeed, we have distinguished, in

[1] Droit Administratif (7th ed.), II, p. 17.

the technical terms, between a case involving penalties and a case where an *ultra vires* act is simply annulled. This terminology has behind it the consecration of statute. In the 9th Art. of the Act of 1872 organising the Council of State of the Third Republic, it is enacted as follows: "The Council of State shall decide in a sovereign sense all cases of administrative law and requests to annul on the ground of *ultra vires* acts of the different administrative authorities." As the result of the favour accorded by the decree of November 2, 1864, and of the confidence inspired by the Council of State, cases in which the plea of *ultra vires* was concerned grew in number. The Council of State, indeed, insisted on treating such a plea as subsidiary to the first and on receiving it only when no other remedy was possible. Nevertheless so just has been the number of such cases this latter argument has been abandoned.

Its abandonment was necessary in order to determine the real distinction between *ultra vires* administrative cases and the ordinary type. Dominated as it was by a subjective concept—the idea that every case involves a right deduced from abstract justice—the lawyers found this no easy task. They did not perceive that the growth of cases dealing with *ultra vires* acts—a growth due to the pressure of facts and in some sort opposed to the desire of the court—revealed a profound change of which they were blindly ignorant. Sovereignty, on the one hand, and individual

right, on the other, were in process of disappearance.

I cannot even summarise all that has been written on the plea of *ultra vires* in administrative law.[2] But something must be said of the theory of M. Laferrière whose book, as I have pointed out, marks an epoch in the evolution of public law.[3] He distinguishes between cases of simple annulment and cases of complete jurisdiction. In the first he argues the court simply annuls or refuses to annul. In the second the court can pass on all questions of fact and law. The typical example of annulment is a case concerning the plea of *ultra vires*. Four causes give rise to it: There may be violation of an enabling act, of a formal statute, abuse of power, or violation of a fundamental statute. In the last case the plea can only be made by the person who has directly suffered from the violation of his right. Such a plea, moreover, is always a subsidiary method.

But none of this is in reality explained. Why distinguish between annulment and complete jurisdiction? What is the basis of it? We are not told. Why should the plea of *ultra vires* be merely accessory? No reason is suggested. Why, in certain cases, is the plea open to any interested party? Why, in other cases, is it only open to a person whose sub-

[2] [*Cf.* Aucoc, in Comptes Rendus de l'Académie des Sciences Morales et Politiques, 1875; Laferrière, Traité (2nd ed.), II, 394–560; Tournyol du Clos, Essai sur le recours pour excès de pouvoir (1905).]

[3] Laferrière, Juridiction et Contentieux (2nd ed.), II, 394.

jective right has been attacked? To scrutinise the theory at close quarters is to reveal only uncertainty and contradiction.

In simple fact the decisions of the Council of State have become broader and more precise under the pressure of practical needs. The plea of *ultra vires* is no longer of secondary importance. It is not fundamental where a general council draws up a regular clause, even though the plaintiff may have made his plea against such choice. Any interested person, having merely a moral and indirect relation to the act, may ask for the cessation of its results. The plea no longer aims at protecting the subjective right of the private citizen. The Council of State has admitted a plea against irregular nomination to the Civil Service of any person having the necessary qualification for such office and even the plea of a professional association of officials belonging to the service concerned.[4] This does not of course mean that any qualified lawyer who may protest against an irregular nomination to the Bench has himself to be nominated.

In such circumstances Laferrière's theory is useless. We must search in other directions for the answer. Everything becomes clear once we eliminate the idea of subjective right. We must replace it by the fundamental notion of modern law. We must

[4] The cases are numerous; *cf.* especially the Lot–Molinier decision, Recueil, 1909, p. 780; the Alcindor decision, Recueil, 1906, p. 906; *Ibid,* 1908, p. 1016; *Ibid,* 1910, p. 719.

replace it by the concept of a social function, of a legal situation to which the idea of public service is intimately bound. The noble jurisprudence of the Council of State on the plea of *ultra vires* is only the translation of these ideas into practical terms.

II

The question raised in an administrative case is whether there exists a subjective legal situation and the extent of it. It arises when, after an administrative act has been performed, we have to know if it has created a subjective legal situation or if it has modified or destroyed a pre-existing situation. When such a question is raised, it is the business of the administrative courts to analyse it and to measure the penalty. Its decision has then a merely relative and individual bearing parallel to the situation of which it is the expression. The plea can only be made by the person who claims to have benefited from the situation whose existence or extent is called into question.

It may be, on the other hand, that the only question the case raises is whether the administration has in the most general sense violated the law. That is simply a question of objective law that the judge decides. The case comes before an objective tribunal. The judge simply states whether the law has or has not been violated. If he thinks it has not been, he rejects the plea; if he thinks it has, he annuls the pro-

tested act. His decision is purely general. The act is annulled for every citizen and not less for the administration itself. The judicial decision in such a case is as general as the statute that has been violated.

Such a plea is certainly not admissible against every administrative act. Obviously, for example, there cannot be annullment of the material work of the administration. It is possible to annul an effect of law; we cannot annul a fact. Nor is it admissible where the administrative act gives rise to a subjective situation. It is not then a question of legality but of knowing whether the new subjective situation destroys or modifies the old, and the person by whom the plea is made must be a party to the particular act. In other words, where the situation is subjective, the administrative law is personal also. The objective plea is possible only when the act is objective. Such acts are numerous enough, since they include everything based on ordinance. From the material point of view, they are of course statutes; but from the point of view of formal theory they involve the plea of *ultra vires* because they derive from a government official.

Merely administrative acts do not create a personal situation. There are acts which create either a purely objective legal problem or raise the question of capacity. Such acts are very frequent in public law; and with the growth of the objective conception their number is continually increased. A clear ex-

ample is the nomination of a civil servant. This does not in reality produce any effect of law. It does not create capacity nor does it give the official status. It is simply the condition that gives rise to that legal situation we call the status of a civil servant with all that it entails—capacity, regulation, salary, pension. Very often the deliberations of an administrative council are a declaration of will from which an act draws its vitality. A grant from a general or municipal council, for instance, is the necessary condition from which the prefect or the mayor has the capacity to issue an ordinance.

These different acts, like all regulating acts, have an objective character. They are not individual but general. They affect the whole citizen body, particularly every one affected by the department that does the act. In fact, they do not themselves directly produce any legal result; but since they condition the application of the statute which does create that effect, they indirectly have this consequence. They are acts of will and therefore cannot escape the control of the courts. Objective in character, they give rise to an objective process. A plea may be brought by any interested citizen. The judge does not penalise; he either annuls or refuses to annul, and his decision is purely general in its bearing.

Such objective administrative law, most clearly seen in the sphere of *ultra vires* acts, is the great and original creation of French jurisprudence. It to-day dominates all public law. I have now to show its

extent and development and how its application fits in with the fundamental concept of public service.

III

French law has specially organised certain objective pleas. A notable example is the case of electors, where the simple question is whether the procedure has been legal and where, if illegality results in annulment, the result is obviously general. Similarly with the jurisdiction of the Court of Conflicts; the only question for the court is the legality of the procedure. Here, by hypothesis, the administrative law is objective.

On the other hand, the plea of *ultra vires* is, so to speak, the general synthesis which dominates the whole of law. An objective act, whether done by the president of the Republic, or by the humblest official, may be attacked by any citizen on the ground of *ultra vires* and the Council of State will pass on its legality. The cost is a 60 centime stamp. No right is invoked. The citizen is living under the régime of state and law and where the government violates the law he has the right to demand judicial censure. Abuses, of course, must be prevented; and the courts therefore demand that the intervener shows a special interest before admitting the plea. That interest, however, may be as indirect as a tax payer's [5] interest in seeing that the Court of his commune does not

[5] Casanova decision, Recueil, 1901, p. 333.

make irregular contracts,[6] or a simple moral interest, as where individuals who have the qualifications for a certain official position may prevent the nomination of those who lack the necessary titles.

The objectivity of the plea of *ultra vires* is clearly in the fact that where the Council of State deals with the case it must either annul or refuse to annul the act concerned. It cannot merely condemn the act. Sometimes it may send the parties before a minister; but that is only a direct invitation to the minister to conform to the verdict of the courts. Annullment is perfectly general and binding upon citizen and government alike.

I said above that there was a moment when jurisprudence appeared to admit several methods of pleading against administrative acts—incapacity, wrong forms, abuse of power, violation of statute; and it applied the different rules in its reception of the plea. To-day no such distinction is made. The only question is whether any statute whatever has been violated. The question is always the same. The conditions under which a plea is received are always the same. Sometimes it still seems as though the distinction is drawn between incapacity, violation of statute, and abuse of power; but this is rather the terminology of custom than the admission of reality.[7]

The plea of *ultra vires* may be made against any

[6] Lot–Molinier decision, Recueil, 1903, p. 780.

[7] *Cf.* Hauriou, Droit Administratif (1911), p. 429; Tournyol du Clos, op. cit.

objective act of any governmental institution or official with the exception of parliament, the two chambers, the courts and judicial offices. The reason for their exception is of course obvious. There exists, indeed, special control of legal personages and appeal against the decision of a court or a judicial officer can naturally be taken only before an institution with the same purpose. Were it otherwise, we should violate the unbreakable principle that justice and administration must be kept separate.

Why except the decisions of parliament or of one of its parts? Doubtless a time will come, perhaps not distant, when the exception will not be made; but that evolution has not yet been accomplished. The basis of the exception is the persistence still of the old idea that parliament and the chambers directly express the sovereign will of the nation. I pointed out above the clear tendency to-day to recognise the possibility of controlling statutes by legal action; *à fortiori* the day will come when the high court will take cognisance of the legality of any decision coming from a single chamber or from an office of that chamber.

So far as the president is concerned, his acts can always be attacked on the ground of their *ultra vires* character. Undoubtedly since 1875 the character of this office has undergone a profound change.[8] While

[8] [*Cf.* Jèze, La Présidence de la République, Revue de Droit Public, 1913, p. 112; H. Leyret, Le Président de la République (1912).]

this may be noted in passing, its importance can only be mentioned, because it belongs rather to politics than to public law. In the political system inaugurated by the constitutions of 1791 and 1848 the chief of the state was clothed with executive power in its original sense and was thus the true incarnation of one constitutional element of sovereignty. He had a representative character in the field of the executive such as parliament exercised in the field of legislation. His acts were thus the direct emanation of national sovereignty and, like parliamentary acts, beyond the scope of administrative law.

Undoubtedly those who constructed the constitution of 1875 had the same conception in mind. This is clearly shown by the Septennial Law, "which confided for seven years executive power to Marshal MacMahon." Successive presidents were to have the same character as he. Like him, they were to have that part of sovereignty we call the executive power. They were to be representative of the nation and so beyond the reach of law.

Since 1875 the president has progressively lost his character. Little by little he has ceased to be a representative of national sovereignty. He has been simply an administrative agent, a high agent, indeed, of the administrative hierarchy, but still no more than an agent.[9] As a result, all his acts can, as a matter of principle, be attacked on the ground of their

[9] [The change, under M. Poincaré, since 1913, is, however, notable.]

ultra vires character. This change is not connected with the disappearance of the imperialist notion of sovereignty. That notion might have remained unbroken even though the character of the presidency had changed. The two evolutions are parallel but independent. The principle cause of the change is to be found in the origin of the office. From the fact that he is elected by parliament it has been concluded that the latter alone is a representative organ concentrating in itself all sovereignty, and it has been suggested that since it makes the president, he can be only an administrative agent. It is in this way that the transformation of his office has been harmonized with the general evolution of public law that no act of his is beyond the reach of justice.

There are, however, two classes of acts still beyond the reach of the courts. In the first place acts connected with the constitutional relation of the chambers of the government, as for example the convocation or adjournment of the chambers, the closing of a parliamentary session, the convocation of the electoral colleges, with all of these, and for a perfectly simple reason, the courts cannot concern themselves. The government, in this regard, acts under the direct control of parliament, and to submit its action to the courts would be, indirectly, to submit the action of parliament to the direction of the Council of State. For the present this is impossible.

This is made very clear in what concerns the decree of convocation for elections. Each chamber is given

by the constitution "the right to judge the eligibility of its members and the legality of their election." [10]

To recognise in the Council of State a power to pass upon the regularity of the decree would be to permit its encroachment upon the power of the Chambers. Thus, the Council of State has itself decided in a recent decision. It rejected the plea of a Councillor General against the decree of April 2, 1912, fixing May 19th for the election of a senator for Belfort. "The legislative assemblies having the right to verify the powers of their members are alone competent in the absence of a contrary text to pass upon the legality of acts which constitute the preliminaries of the elective process." [11]

A second category of acts beyond the power of the courts are diplomatic acts; that is to say, acts concerning the relation of France with foreign powers. The jurisprudence on this point is as constant as it is continuous. No plea of *ultra vires* will, under this head, be received. Very notably by its decision of 1904, the Council of State has decided that the private citizen cannot make use of administrative law against the French state in the relation to the declaration annexing Madagascar.[12] The reason of this is perfectly clear. Diplomatic acts directly interest the national security. Government action, here indispensable to the national safety, cannot be submitted

[10] Law of July 16, 1875, art. 10.

[11] Le Temps, August 11, 1912.

[12] Recueil, 1904, p. 662; Revue de Droit Public, 1905, p. 91.

to a litigious criticism. The diplomatic service operates under special conditions. It is the only service the management of which entails relationship with foreign governments. Large as is the control exercised by the courts over internal service, it clearly cannot extend to the diplomatic services. Taken all in all, it is always the theory of public service that remains as the governing principle of all these solutions.

IV

These exceptions, apart from every act of a president in his official capacity, can be attacked on the ground of *ultra vires*. This is a great step forward of which the importance can hardly be overestimated.

It is not long since the decision was made that every decree regulating public administration, that is to say ordinances, made on the initiative of the legislator with the advice of the Council of State, could not be touched by law. This is no longer the case. In its decision of December 6, 1907, the Council of State expressly recognised that the plea is acceptable. Its language is perhaps unfortunate in that it speaks of legislative delegation; but the phrase perhaps makes the decision rather of wider bearing than the contrary. On the other hand, the consequences of the following passage are important. "Considering that conformably to the terms of Art. 9 of the Act of May 4, 1872, plea may be made for the annul-

ment of administrative acts on the ground of *ultra vires*; considering further that those acts of the head of the state which regulate administration are performed by virtue of legislative delegation and consequently imply the exercise to the full extent of the powers conferred by the legislature on the government in the particular case; nevertheless, since they are derived from administrative authority, they are subject to the action foreseen in Art. 9 as cited above. . . ." [13]

The plea of *ultra vires* thus obtains against every governmental act to which legal consequences attach. Here is involved in this the abolition of an idea which had long in France the force of a dogma and is still law abroad. It abolishes what are called in French governmental acts and in Germany *Staatsnotrecht* or *Notverordnungen*.[14]

By these phrases are meant acts which, either by reason of their intrinsic nature, or the source of their origin, are open to the plea of *ultra vires,* but are declared beyond the law by reason of the political end they are intended to serve. The phrase "political end" is used in its most ordinary sense. The word "political" has indeed two senses: it may mean the act of governing a nation, of assuring its happiness and prosperity; that is its highest and noblest sense. It may also mean, and that is its ordinary acceptation,

[13] Recueil, 1907, p. 913, *cf. Ibid,* 1908, p. 1094, and *Ibid,* 1911, p. 797.

[14] Jellinek, Gesetz und Verordnung, p. 377 [and W. Harrison-Moore, Act of State in English Law (1906)].

the art of obtaining office and of remaining there after arrival. Acts determined by a political end were placed beyond the power of law because they were usually made to keep a government in office. It was *raison d'Etat* under another name.

For France this is happily no longer true; and its disappearance is due to the impartial and independent jurisprudence of the Court of Conflicts and the Council of State. It has been made possible by the disappearance of the imperialist theory of sovereignty. The two facts have been so intertwined as to be reciprocally cause and effect.

The doctrine, however, was long defended in France by high authority. It is customary to cite the well-known declaration of M. Vivien, the reporter of the organic law of 1849 of the Council of State: "There are rights," he said, "the violation of which cannot give rise to an action in the courts. In a representative government, where the principle of responsibility obtains, there are circumstances where a great public necessity may compel ministers to take measures harmful to private rights. For such measures they must answer to political authority. To render them subject to the administrative courts would be to paralyse an action exercised for the common interest. It would be to create in the state a new power which would threaten every other." It is a skillful defense of *raison d'Etat,* but its dangers are obvious enough. It was supported by great lawyers like

Dufour[15] and Batbie.[16] The Council of State made a striking application of it in 1867 in relation to the seizure by the prefect of police of the writings of the Duc d'Aumale—a seizure approved by the Minister of the Interior. The Council of State refused to hear the action on the ground that the seizure was determined by political reasons.[17] Nine years later, under a Republican government, the Court of Appeal of Paris on the same grounds declared itself incompetent to hear the action taken by the Prince Napoleon against the Minister of the Interior and the Prefect of Police for the issuance and enforcement of the decree of expulsion against him.[18] This was the last time that the French court invoked so arbitrary and despotic a principle to declare a plea non-receivable. Political motive is no longer a ground of such action.

Implicitly, indeed, but none the less clearly, the Court of Conflicts has rejected this doctrine upon the Jules Ferry decree against the religious congregations. In his argument M. Ronjat for the government had urged that "it may be suggested that acts done by public authority are government acts beyond the competence of the courts. . . Did such acts exist, this decree would be one of them. . . . If you

[15] Droit Public, IV, 600.

[16] Droit Administratif, VII, 401. [*Cf.* a full discussion and Bibliography in M. Le Courtois, Théorie des Actes de Gouvernement, 1899.]

[17] Recueil, 1867, p. 472.

[18] Sirey, 1876, II, 297.

think that the act has not the character thus indicated, you have to examine if it is an administrative act to be dealt with only by the administrative courts or if it comes within the scope of the ordinary tribunals." The question was well framed. The Court of Conflicts decided "that it could not be the business of the judicial authority to annul the effect or prevent the execution of this administrative act . . . if the petitioners think that the measure taken against them is unauthorised by statute, they must go to the administrative courts to obtain its annullment." [19]

The Court of Conflicts rejected the plea of political character and admitted the action of *ultra vires.*

The Council of State has not less clearly rejected the same theory also. The Minister of War, on the basis of the law of June 22, 1886, relating to members of the families who have reigned in France, had struck the names of certain members of the House of Orleans, and of Prince Murat, from the Army list. They combined to sue him, and the Minister of War asked that the rejection of their plea on the ground that political problems were involved. The Council rejected his demand. It pointed out "that it is clear from the very text of the ministerial decision that it was taken in the application of Art. 9 of the Act of June 22, 1886. It was thus taken in the exercise of powers given to the Minister to ensure the execution of the laws. Decisions made for that end may be brought before the Council of State." The Coun-

[19] Sirey, 1881, III, 85.

cil rejected the plea of the Prince of Orleans but decided in favour of Prince Murat.[20]

Several years later this decision was confirmed by the Court of Conflicts. It decided, in three separate judgments, that political motives do not invalidate judicial capacity. The problem involved was the seizure by the prefects, acting on governmental instructions issued in accordance with Art. 10 of the Code of Criminal Instructions, of certain pamphlets and portraits of the Comte de Paris.[21] Despite these reiterated decisions, this dangerous theory continually reappears. It is the natural tendency of a government to desire the withdrawal of its acts from the control of the courts. In 1911 the Court of Conflicts had again to condemn this effort. It asserted judicial power to pass upon a suit brought against the Minister of France to Haiti, who had, after a series of incidents, refused to marry two French citizens. The Court of Conflicts decided that while diplomatic acts are without the category of ordinary law, acts merely inspired by diplomatic reasons but not in themselves diplomatic are not so protected. The decision holds "that it matters little when, as in this case, the intervention of the diplomatic authority is not contrary to the clauses of the treaty, is not prohibited by local legislation, that his refusal should have been inspired by political motives." [22] The im-

[20] Sirey, 1889, III, 29.

[21] Sirey, 1890, III, 32.

[22] Recueil, 1911, p. 400; Sirey, 1911, III, 105.

portance of the decision lies in the opinion of the court that reasons of external politics are no more than reason of internal politics valid ground for escape from judicial control. The plea of *ultra vires* is thus the supreme method by which all administrative action is subject to the courts. It is important to remember that it is not based on a subjective individual right opposed to state sovereignty. It is based on the defence of an objective law, of a law of public service. Each citizen is, so to speak, an agent of government. He aids in the protection of law. He asks from the courts the annulment of illegalities. It is, of course, true that it is the interest of the citizen which secures this intervention; that law, however, is not protected by this interest but by the idea of public service which, looking to the good operation of the state, demands respect for law. The citizen is armed to obtain this protection. It is not his law, not even his interest that is involved in the doing of justice. The case may not profit him by its real result because its real purpose is entirely objective in character. Such an institution is obviously entirely social in character and shows the great change attendant on the traditional conceptions.

V

Modern public law has thus abolished activity of state; political reasons no longer provide a bar to legal action. But public law has gone further still.

It has recognised that the presence in an administrative act of certain motives *ipso facto* strikes that act with nullity. Just as there is no longer an act of state so there is no longer a discretionary act, an act that is to say of a sheerly administrative character.

A discretionary act is not beyond the reach of law. It can be attacked for lack of capacity or incorrectness of form. Formerly when such an act was legally done by a competent official it could not be attacked, whatever the end for which it was made. No tribunal could examine that end, not even the Council of State; nor could the act be annulled because the end itself was illegal.

Most administrative acts possess this character, and it was possible to speak with justice of the discretionary power of the administration. In the books on administrative law thirty years ago this phrase was found practically on every page. In many of the decisions of that time the action of *ultra vires* found no place for similar reasons. These acts corresponded to what the Germans call acts of free interpretation about which there is still much controversy.[23] In France to-day the discretionary act no longer exists. The Council of State can always take account of the purpose by which an act is determined and annul it if it thinks that the administration, however formally capable, has pursued an end other than the law had in view in its conference of powers.

[23] *Cf.* Mayer, Droit Administratif Allemand, I, 212; Laun, Das freie Ermessen und seine Grenzen (1910).

Thus we have what is called an abuse of power. At bottom it is simply an *ultra vires* act and the plea is of that nature. The official violates the enabling statute when he does something outside his powers or if he does something for a purpose he has no right to pursue. The phrase "abuse of power" is a felicitous one because it clearly shows the way in which the violation of the law is made clear.

The working out of this idea in practise is due to the fine independence of the Council of State. It is due also to the high sense of justice by which members of the department of justice—from M. Aucoc under the Second Empire to the eminent men who to-day occupy the position—have been distinguished. But it is worth while pointing out that the theory of the abuse of powers is only the practical working out of the idea of purpose which each day changes more and more the institutions of private and public law. In private law, while the autonomy of individual will involves a legal result, it has not been necessary, in order to settle the validity of a legal act, to find out by what purpose the individual was moved; it was sufficient that he willed something, that he had the capacity to will. The two elements of a legal act was the capacity to will and the object willed.[24] Similarly in public law, while one attached the effect of an administrative act only to the right of sovereignty, it had only to be done by a competent agent to be valid. With the disappearance of sovereignty the

[24] *Cf.* Duguit, Transformations du Droit Privé (1912), p. 82f.

element of purpose became essential. Validity no longer depended on the emanation of the act from a competent official. It was necessary also that the act of the latter should be determined by the end the statute had in view when it gave him his powers. This end never changes; it is always the adequate operation of the service with which the official is connected.

This makes plain why discretionary acts exist no longer. However wide may be the powers of an administration, the private citizen may always enquire into its motives. The Council of State may attempt their measurement, and its dissatisfaction with the result may lead to the annulment of the act. Whether the official is the president of the Republic or the humblest civil servant makes no difference. The character of the act is unimportant. The question of motive brings every act of every official under the control of the courts.

It is clearly a striking change, and it is yet another proof of the disappearance of sovereignty as a basis of law. This evolution of course was not accomplished in a day. Its beginning goes back to the beginning of the Second Empire, and the earliest cases are in themselves but of secondary interest. They dealt with prefectorial decisions, regulating traffic in front of stations. It was held that in taking his decision the prefect had in view not the security and good order of the traffic but the interest of the customer he wished to benefit. The Council of State

annulled these decisions on the ground of abuse of power. In 1872, again, the match monopoly that had been established by statute involved the payment by the state of compensation to certain suppressed factories. Certain prefects, acting on the instruction of the Minister of Finance, closed these factories in virtue of the power given them in 1810, which gave the right to control dangerous and unhealthy warehouses. These decisions were annulled on the same ground. From such meagre beginnings the concept had undergone a wide expansion in French public law.

From the mass of cases in which the Council of State has clearly applied this notion I can select only some of the most characteristic. It has annulled a governmental decree which dissolved a municipal council to redress electoral irregularities. It was held that the government can dissolve a municipal council only to secure a good administration of the commune. It is thus an abuse of power to commit an act which, however formally competent, serves a purpose that the statute invoked did not have in view.[25]

The Council of State annulled a decision of General André, the Minister of War, who excluded a grain dealer from participation from contracts issued by the war office on the ground that his political and religious opinions were disagreeable to the Minis-

[25] Recueil, 1902, p. 55; Sirey, 1903, III, p. 113.

ter.[26] It was held that the motives involved were without relation either to the contract involved or to the merchant's professional capacity.

For some years the prefects, using the power of control given to them by the Act of 1884, have controlled those municipal councils whose political and religious tendencies displease them. Such considerations are of course entirely foreign to the administration of the commune. Every time the problem has come before the Council of State, that body has rightly annulled this procedure. The Prefect of Doubs desired to force a commune to lease its presbytery. He therefore declared that he would not approve certain proceedings of the Council until the presbytery had been leased conformably to the law of 1907. The decision was ruthlessly annulled. It was pointed out that the prefect had used his powers for ends quite alien from those for which they were given.[27]

It was for long admitted that every minister could both delay the list of candidates in the examination of his department, or even use his discretion in taking out the name of the candidate. In 1851 the Council of State actually held that it could not review such a decision as being outside its jurisprudence. The Court has now held that the plea may be received and that the idea of discretion no longer holds. The

[26] Recueil, 1905, p. 757.

[27] Recueil, 1911, p. 289; Sirey, 1912, III, 41.

attitude of the Court has been well explained in the note of the representative of the department of justice M. Heilbronner. "If a candidate has all the qualifications demanded by law, can the Minister," he asks, "exclude him from his candidacy on the ground that he belongs to a special class of citizens?" The question arose over a candidate who, being a priest, had been excluded from the examination for a Fellowship in the University in Philosophy. Though the Council of State upheld the decision, it was not because it held that it could not examine the motives of the ministerial action. It was because, having examined them, it thought they were legal and tended to serve only the adequate functioning of the university. It pointed out that this fellowship implies not only a university status but also fitness to teach in the secondary schools of the state. "In refusing," said the Court, "to allow the plaintiff to take the examination, the Minister of Public Instruction has only used powers conferred upon him by law; and the decision is therefore in no sense *ultra vires*." [28]

The governmental explanation of the decision gives us its connotation. "The theory of discretion is to-day abandoned. Discretion to-day means that the minister can act as he will, provided he acts legally and for the purpose the law is to serve." The exclusion of a priest from the examination fulfilled the purpose of a law which restricted secondary and primary instruction to laymen. The note clearly

[28] Revue de Droit Public, 1912, p. 453.

points out that the decision would be different if higher education were concerned, since these positions are based upon the capacity of the candidate.

In conclusion one or two decisions annulling the action of municipalities for the abuse of power may be mentioned. The mayor of Denin was in the habit of meeting his political committee at a certain cabaret. He dismissed a policeman who registered a complaint against its landlord. The court annulled the mayor's decision.[29] The court has similarly annulled the mayoral instructions derived from anti-religious zeal. In these decisions it is possible to discern a new extension of this plea. Heretofore the plaintiff, to be successful, had to furnish direct and positive proof that the official had been actuated by motives foreign to the service. In the religious cases cited above it seems to have been sufficient for the plaintiff to establish that the reason given by the police upon which mayoral action must be based, did not exist in fact. That does not change in any way the nature of the plea of abuse of power, but it makes it wider and this extension enlarges the control of the courts over business administration.[30]

VI

This evolution, however, is not yet complete. Violation may involve condemnation of the administra-

[29] Recueil, 1900, p. 617.

[30] Recueil, 1909, p. 180; *Ibid,* 1909, p. 307; *Ibid,* 1910, p. 49; *Ibid,* 1910, p. 192.

tive acts by the courts; but to complete the control of the courts the private citizen must have the means of compelling the government to execute the decision of the tribunal. He must be able to prevent the repetition of the act. He must be able to compel the administration to conform to the verdict of the court, to reinvest, for example, an official who has been illegally dismissed when the Council of State has so decided. Theoretically, there is no doubt that he has the power—theoretically, the government is subject to the control of the courts.

It must however be admitted that this means of constraint has not yet been developed. "The absence of this sanction," as M. Hauriou has very rightly said,[31] "has not had much inconvenience because government has made it a point of administrative honor spontaneously to obey." He points out how "under the combined action of decentralisation and the electoral régime this administrative honor no longer exists. The government departments deceive and defend themselves against the courts which embarrass them in their political schemes. . . . This bad faith is not confined to the municipalities; it is found also in the prefectures which can no longer be relied on to call back a municipality to legal paths. . . . This same bad will has wormed its way into the government departments. In an admirable and just phrase ministers are said to boycott the Council of State. It is not, of course, the minister himself . . .

[31] Sirey, 1911, III, 121.

it is his department. The department is in revolt against the embarrassment caused by the Council of State."

This picture is perhaps too black. In most cases the administration spontaneously submits to the will of the court, whether to obtain a note of credit from parliament to pay damages, or to reinstate an official irregularly suspended or dismissed. There is, however, sometimes resistance. The temper of politics makes itself felt with odious results. The extension of the courts' control provokes administrative resistance. It is perhaps natural enough; for every new social force has to make its way against the conservatism of existing facts. The politicalisation of the government is in reality only a secondary cause. The fundamental reason is the reaction of new ideas upon a situation which ambiguity has tended to make privileged.

The Council of State has so far realised this that its decisions often show the effort to defeat a contingent administrative resistance. It does not of course attempt to substitute itself for the active executive power. It corrects the irregular decision but it does not substitute its own decision for it. It remains a judge and not an administrator. When, for example, the prefect violates the law of weekly rest, it annuls the act without according the permission that the law demands. It takes account of a possible refusal to obey the law by the terms of its decision. "Send X before the prefect of the department and give him

the authorisation to which he has the right in law." [32]

This formula of address to the administration is now very frequent in the decisions of the Council, particularly in annulling prefectorial determination on the weekly closing law. The Council has not yet dared expressly to annul the decision by which a prefect has refused to enter upon a communal budget some necessary expense; but it has sent the interested party to the Minister of the Interior with an injunction to the latter to secure this end directly from the department.[33] This is not real constraint, and it must be admitted that for the moment a direct refusal of authority to take account of the decision cannot be countered directly or indirectly by the courts. A case, in itself unimportant, is here of interest because it shows in this connection how the mayor of the little commune may hold in check the highest administrative council of the country. By Art. 102 of the Act of April 5, 1884, a mayor cannot dismiss a rural policeman, but he can suspend him for a month. The mayor of Cotignac, to evade the law, suspended a policeman for a month and renewed the suspension every month. This was of course equivalent to a dismissal, and a decision of 1909 annulled the mayoral decrees. The mayor took no account of the annulment and continued his suspension. In 1910 the Council of State annulled seven new decrees by the mayor. This could obviously continue without

[32] Recueil, 1906, p. 880; Sirey, 1907, III, 17.

[33] Recueil, 1908, p. 689; Sirey, 1909, III, 129.

limit; and if the minister did not dismiss the mayor the courts would have no means of forcing their control.[34]

Here is the real gap in our public law. The only way in which it can be filled is by enforcing the personal responsibility of the civil servant. It is the absence of that responsibility that deprives the decision of the court of its effect.[35] It will be seen below how theory and practise are making a subtle but precise distinction between acts of function and private acts in which the latter will involve the personal responsibility of the official. An act is personal when the motive of the official's act or his refusal to act is unconnected with the operation of his post. Clearly a civil servant who knowingly refuses to obey the decision of a court is acting outside the boundaries of his service. Every judgment is presumed to conform to the law. Every law is founded on the interests of the public service. To show contempt of the decision of the court is to show knowingly a contempt of the department of the service and so to commit a personal fault.

There is no doubt that the responsibility of a recalcitrant official will be secured in the future. The Cotignac policeman could certainly have won a personal action against the mayor; but the procedure, as

[34] Recueil, 1909, p. 727, and 1910, p. 606; Sirey, 1911, III, 121.

[35] [It is exactly here that Professor Dicey, of course, finds the superiority of the English rule of law.]

I shall show below, is long and complicated and costly. The ordinary courts try these cases and appeal can be and always is taken to the highest tribunals.

That makes the petitioner hesitate. He is mistaken because he is bound to succeed. But he would perhaps hesitate less if he could go to the Council of State and if his plea, like the plea of *ultra vires*, involved no other expense than that of registration. The Council very naturally penalises any civil servant who neglected its decree of annulment or penalisation. This path, it is possible, will be opened up in the future.[36]

[36] *Cf.* Berthélemy, L'Obligation de faire en Droit Public, 1912, p. 511f.

CHAPTER VII

RESPONSIBILITY

Is THE state responsible for acts done in its name? Merely to ask the question is to reveal a profound change in public law. The men of the Revolution would have been astonished at the demand. The Declaration of Rights, Constitutions, the statutes of the Revolutionary period—in none of these is there a single text which makes any allusion to a general responsibility on the part of the state. There is affirmation, of course, that the individual has the right to certain guarantees against arbitrary power. They are found, however, in the separation of the powers, in the divisions of functions, in the responsibility of officials. No one thought that they could be found, and are essentially found, in the responsibility of the state. To-day a highly sanctioned and widely cast state responsibility is regarded as the best safeguard of individual freedom. We have to trace the stages of this evolution.

I

The texts which consecrate the responsibility of officials are very numerous. The principle was in

the Declaration of 1789: "Society has the right to demand responsibility for administration from every public official." In the preamble to the third title of the Constitution of 1791, it is stated that "the executive power is delegated to the king to be exercised under his authority by his ministers and other responsible agents." The same principle is quite clearly formulated in 1793 and the year III;[1] and it was considered so fundamental and supreme that when, in the year VIII, it was desired to constitute a central government so strong as not to be subject to electoral and democratic influence, the responsibility of public officials still remained untouched. The principle was formulated with the same rigidity; but the Council of State had to give governmental authorisation to the prosecution of a civil servant. This is the famous article 75 of the Constitution of the year VIII. "Government officials other than ministers of state can be prosecuted for acts relative to their functions only in virtue of a decree of the Council of State." When in 1830 the Charter of 1814 was revised in a sense deemed liberal, a statute was announced "on the responsibility of ministers and other agents of the executive power." The statute, however, was promulgated without being passed, although long discussions filled the entire session of

[1] Declaration of 1793, arts. 24 and 31; Constit. of 1793, arts. 55, 71–3, 83; Declaration of the Year, III, art. 22; Constit. of the Year, III, arts. 200, 201, 203.

1835. In 1848 the principle was formulated in a still more wide and general fashion. "The President of the Republic and ministers and officials exercising a part of sovereign power are responsible in so far as each is concerned for all acts of government and of administration."

No text since 1789 makes the slightest allusion to a general responsibility of the state. That does not mean to say that responsibility was outside men's thoughts; for many texts affirm the responsibility of all public officials. No one thought of making the state responsible, because, for the legislator, it was an evident and tangible dogma that the state was not and could not be responsible.

That was logical enough. Close analysis suggests that sovereignty and responsibility are mutually exclusive notions. Sovereignty, of course, can be limited. In the traditional theory of public law it limits and reciprocally is limited by the right of the individual. These reciprocal limitations are regulated, and can only be regulated, by statute which, expressing the general will, is derived from sovereignty itself and forms the national law. At bottom, therefore, the sovereign state creates law and the idea of responsibility is thus excluded. For, in the general acceptance, irresponsibility implies a violation of law. That which creates law by its sovereign will clearly cannot violate it. Just as in an absolute monarchy the king can do no wrong, and is therefore ir-

responsible, so the democratic state, which is no more than the nation sovereignly organised, can do no wrong and escapes responsibility.

The sovereign state cannot be responsible because of statutes, because statutes are the expression of sovereignty. Nor can it be responsible for executive, judicial, or administrative acts. If they conform to statute there is no question of responsibility at all. If they are contrary to it the question does not relate to the state which has willed that the statute should be executed. The violation is that of the official who substitutes his own will for the will of the sovereign state. It is the official, therefore, who is alone responsible.

It is very logical, so logical that some radical writers of authority have not been able to escape from the obsession that sovereignty imposes. Forced to recognise that the state is sometimes responsible, they declare that it cannot be responsible when it acts as a sovereign power unless its statute has so ordered. This is the attitude of M. Berthélemy. M. Teissier, in an able work,[2] is less definite; but his mind is still dominated by the idea that where the state shows itself in its sovereign capacity the question of responsibility cannot be raised. "Statutes," he writes, "are the highest example of sovereign acts; and without special provision the damage they may cause to private citizens can give rise to no action against the

[2] La Responsabilité de la Puissance Publique, 1908.

state before any court, administrative or other, on the ground of responsibility."

Clearly, sovereignty and irresponsibility are two interdependent ideas. That is clearly affirmed where state responsibility is admitted, save where it acts in its sovereign capacity. That is already to admit that the principle of irresponsibility has its limits. Where is the line to be drawn? How can we tell when we are dealing with a sovereign act and when not? If the state is by definition a sovereign person, it must always be a sovereign person, and if sovereignty implies irresponsibility, it must be irresponsible also. It can hardly have garments suited to every sort of occasion.

It thus follows that if it is admitted that the state may on occasion be responsible, it may on occasion be non-sovereign; but if on occasion it may be non-sovereign, it is in fact never sovereign. I shall show later that there is to-day no aspect of state-activity which does not raise the question of responsibility and answer it in the affirmative. And the need for that affirmation grows each day greater.

It is useful to remember that even in the highly articulated imperialist system of law there was one lacuna. The Declaration of the Rights of Man had proclaimed private property inviolate, it had decided that "no one can be deprived of it save when a legally declared public necessity demands it and then only on condition of fair and pre-arranged compensa-

tion."[3] Here was a clear attack on the principle of sovereign irresponsibility of the state. It is easily explained. The authors of the Declaration of Rights loved the state but were still more lovers of the soil they owned. They admitted that sovereignty was a dogma; but the rights of property were a dogma not less fundamental. The right of property is an individual sovereignty; when it conflicts with that of the state they had to decide which would be successful, and they decided in favour of the right of property.

The fact that every member of the Constituent Assembly was in some degree a landed proprietor is in part at least the explanation of this attitude. When private property is taken, the financial responsibility of the state is recognised. A little later the whole procedure was organised to secure expropriation. The principle had long been favoured by the courts which gave compensation to the landowners for every direct expropriation.

It was approved by administrative jurisprudence, which gave liberal compensation for damage to private property caused by the erection of public works; and that where no illegality or fault could be argued. This attitude was not based on the idea of general state-responsibility but on the inviolability of private property. It nevertheless opened an avenue to that modern theory which tends to recognise the responsibility of the state wherever its intervention, however legal or faultless, imposes upon an individual or

[3] Art. 17.

group a burden heavier than it imposes upon the community at large.

II

Traditional theory makes the notion of responsibility accompanied always by the idea of fault. A rule, that is to say, is violated; if it is a moral rule, it implies a moral responsibility; if a rule of law, a legal responsibility. The ideas of responsibility and of fault demand, as is clear, the existence of a consciously willing person. Conscious violation of a rule of law by a free will involves the responsibility of the person endowed with that will. Such is the metaphysic of the ordinary concept of responsibility. Clearly it makes the problem one of ascription.

It was so understood in the individualist system of the penal and civil codes of France. Penal infraction is the conscious violation of the penal law by a free will, and penal responsibility is incurred by the person to whom this violation is to be imputed. Article 1382 of the Code Napoleon formulates the principle of civil responsibility. Moreover, every person is declared responsible not only for the damage caused by his own acts but also for that of persons for whom he ought to answer or for persons whom he had under his keeping; the reason for which is that he is presumed to be at fault when there is bad choice or bad surveillance.

To pose the problem of state responsibility in these

terms is to picture a state endowed with a free and conscious will which can commit a fault by violating a legal rule and is responsible when that violation can be brought home to it. An important school of jurists accepted this conception. Upon it has been erected an ingeniously subtle doctrine of which the value is only present by reason of its skilful logic. It is urged that the state is a person and the governors are its organs; as such they have no personality distinct from that of the state any more than the organs of an individual have a personality distinct from it. The state wills and acts by its organs; when they will and act it is the state which wills and acts. When they are at fault the fault is committed by and imputed to the state. The state is therefore directly and personally responsible for it.

This theory was created by Gierke for the corporate person in general and has been developed and applied to the state by Jellinek. It has been, with some modifications, adopted in France by two jurists whose authority is deservedly great.[4] Nevertheless, it is no more than an ingenious fiction. It is necessary to reconcile the responsibility of the state with a legal system, where there can be responsibility only

[4] Gierke, Genossenschaftstheorie (1887); Jellinek, Allgemeine Staatslehre (1905); Michoud, Theorie de la Personnalité Morale (1906–9); Hauriou, Principes de Droit Public (1910), p. 659. [Maitland in his introduction to Gierke's Political Theories of the Middle Ages, and in his paper on Legal Personality and Moral Personality in Vol. III of his collected papers, has also adopted this view.] For criticism, *cf.* Duguit, Traité, I, 307.

where there is conscious and willing personality.

Now the facts to-day, as numerous decisions make clear, in no wise demand that the responsibility of the state should be based upon the idea of fault. Tradition, doubtless, makes us still speak of state-fault, but in reality this only means that it is the funds of the state which pay for the damage involved in the operation of its functions. We ought perhaps to speak of another term rather than responsibility, but since that term does not yet exist we must do the best we can with what we have. The sense and bearing of the term can be given precision.

It is not here urged that liability for fault has disappeared or ought soon to disappear from modern law. In the relation of individuals to individuals there can be no other idea. But the notion of fault is out of place where we deal with the interrelation of groups with groups; or groups with individuals. When we deal with an action which is individual, by reason of the will which sets it in motion or the end that it pursues, there can be an individual fault and as a rule, if not always, it is upon this fault that liability is founded.[5] But in corporate activity this is not the case. The act is doubtless put into motion by individual wills, but the end is collective. If a fault is committed by an agent of this collectivity, it is not imputable to that agent since it is for a collective end that it has been committed. Nor is it im-

[5] [*Cf.* Mr. Justice Holmes, two papers on Agency, in Vols. IV and V of the Harvard Law Review.]

putable to the collectivity since the latter outside the imagination of lawyers has no personal existence. The ideas of fault and imputability are thus eliminated.[6]

There thus emerges a new conception to which is attached the whole modern law of state responsibility. To start a collective activity, that is to say an activity which has in view a collective end, affects the funds of the collecting when it occasions prejudice to a group or individual. "Social life and thus legal life," as I have elsewhere written,[7] "is the product of a division of labour between individual and corporate activity. Groups have no wills and cannot therefore be responsible persons. But group activity is none the less an important element of social activity. The task it performs doubtless benefits the whole of society, but more particularly it is the members of a group who are benefited. If they so benefit, it is only fair that they should bear the risk which attaches to the contact of their acts with other individuals or groups."

State activity emanates from individual wills, but it is essentially collective in its end; which is the organisation and management of public services. It follows that if the organisation or management of such a service should particularly prejudice a group or an individual, the funds of that service should re-

[6] [For another interpretation, *cf.* Laski, The Basis of Vicarious Liability, in the Yale Law Journal for November, 1916.]

[7] Transformations du Droit Privé (1912), p. 140.

pair the damage so long as the relation of cause and effect between act and damage is traceable. If the service is centralised it falls upon the general funds of the state.

Such is the single idea upon which is based the whole law of state responsibility. It has already a rich jurisprudence, though it is only at the beginning of its evolution; even though it is sometimes falsified by the persistence of the idea of fault. It implies *eo nomine* the elimination of the idea of sovereignty. When responsibility is attached directly and exclusively to the fact of service it entails the same consequences from whatever source it emanates. The idea must be thrown into such relief as makes plain an evolution of public law destructive of the traditional notion of sovereign power.

III

Ancient tradition, and a habit of terminology that has become inveterate, make many thinkers of eminence still subject to their faith in the sovereignty of Parliament. I have already pointed out[8] that the persistence of this idea has prevented the plea of *ultra vires* being valid against acts of parliament. Its members, indeed, love to pose as interpreters of the national sovereign will. These are no more than words. But everywhere, and in France in particular, words are powerful things; and it is these empty

[8] Supra, chap. iii, § iv; chap. vi, § iii.

formulæ which make the courts so greatly hesitate to recognise the responsibility of the state for acts of parliament. Yet to-day the question is clearly posed. It is discussed everywhere: in the chambers, in the courts, in the market place. The significance of that discussion is obvious.

Let us suppose a private act of parliament voted and promulgated in the form of statute. It is a statute of a formal kind. But if, as has been so long and so unhesitatingly affirmed, parliament is invested with a sovereignty which excludes the notion of state responsibility, it must be so whether its decision is individual or whether it makes a general regulation which is a statute in the material sense. To-day, however, it is admitted that a private decision of parliament may in certain cases involve the responsibility of the state.

I have already mentioned the decisions of the Council of State which ordered the state to pay compensation to certain ecclesiastical institutions in Savoy. They had been injured by the refusal, in accordance with act of parliament of the grant promised to them in 1860 by the French government in return for the surrender of certain rent charges.[9] There is, of course, no question here of a formal statute; but we have a decision of the two chambers on the budget. If parliament is truly sovereign its sovereignty must be manifest in such a note not less than in a formal law. I have mentioned also the protest of M. Mil-

[9] Recueil, 1896, p. 660; *Ibid,* 1904, p. 533.

lerand, then Minister of Public Works, in the Chamber. He was replying to a speech of M. Jaures, who urged that if the state was embarrassed in its negotiations with the Western Railway Company by the agreement of 1883 it had only to pass a statute which would obliterate the obligations incurred. The Chamber refused to follow the policy advocated by M. Jaures.

In both these cases we have of course contract; but when sovereignty is concerned and when parliament is the living incarnation of sovereignty, contract is unimportant. No contract can make the state responsible. If we say with M. Laferrière "that it is a matter of principle that the damage caused to private citizens by legislative measures gives them no right to compensation," parliamentary action would then imply the irresponsibility of the state.

Let us now suppose that parliament passes a material and formal statute; it passes a general regulation which is promulgated by the parliament. Does such an act involve responsibility? Merely to ask the question shows the profound change in our conceptions.

But the question is asked, and parliament must answer it. When a statute is passed of which the application will prejudice the interests of a certain class of citizens, ought the legislator to make compensation a principle of the statute? The question has been eagerly discussed in France and abroad. It was discussed in France in relation to the statute of 1909

forbidding the use of white lead; in Switzerland in relation to the Federal law of 1910 forbidding the use of absinthe; in Uruguay and Italy in 1911 in relation to laws making insurance a public monopoly. The question is not one of legislative morality but of right; it is in the name of a principle of right superior to their powers that the parliaments ask if they ought not to compensate by statute those who are specially harmed by their action. Thus the faith of legislatures in their own sovereignty is seriously shaken. That is a symptom of importance. We are to-day in a period of transition. The new law is in process of elaboration; but we can already see the elements of the solution it will offer. If the new statute should prohibit certain acts till then lawful, because it considers them contrary and ideal right, it ought not to compensate those harmed by its prohibition. Legislators only formulate a legal principle in the interest of a public service; the national exchequer ought not therefore to bear the burden of a baseless responsibility.

An answer has been made to this argument. So far, it has been said, what was done was done legally and the new law prohibits in the general interest; surely, therefore, it is logical that the state should repair the special prejudice occasioned. Such an argument should not prevail. Assuredly the notion of sovereignty, as this book attempts to show, no longer lies at the basis of public law. But a material statute is none the less the formulation of a rule of right.

"Law," as I wrote some years ago,[10] "is not a mass of absolute and unchanging principles, but on the contrary a collection of rules which vary with time. It follows that a situation may at one time be legal even over a long space of time, but not always legal. When a new statute abolishes it those who have profited by the earlier legislation cannot complain of the change because the new law only registers the evolution of the notion of right."

After long discussion, and several contradictory notes in the Chamber and in the Senate, the Act of 1909, forbidding the use of white lead in the manufacture of paint, refused an indemnity to the makers of that product. In the long discussion in the Senate on the question of compensation M. Viviani, then Minister of Works, pointed out that the question was not of the expropriation of an industry but simply of the prohibition of a material recognised by science as essentially harmful. The employment then had to be forbidden by law. The minister did not invoke the supposed sovereignty of parliament. He sensibly observed that similar laws in Germany and Austria had given no compensation. A compromise was finally arrived at between the Chamber and the Senate by which the indemnity was granted but the prohibition was not to become effective until after a period of five years.

In the next year a statute was passed which prohibited the sale of baby comforters. Their use had been

[10] Traité (1911), I, 164.

denounced by doctors for several years as one of the principal causes of infant mortality. The question of compensation was not even raised. "We must make," said M. Durand, the Reporter to the Chamber, "a clear distinction between expropriation and the substitution of a state industry for one operated by private citizens, in which case compensation is due, and between industries which the state prohibits simply in the general interest which in this case is the protection of the race."

Parliament is actually considering bills which prohibit the manufacture and sale of absinthe which is incontestably harmful and an active agent in promoting alcoholism. If, as one must hope, these bills succeed, there is no reason to reserve compensation for the benefit of the manufacturers. They are public poisoners whom the law ought, as soon as possible, to prohibit from so culpable an enterprise.

It ought, however, to be pointed out that a similar Swiss act of 1910 has reserved compensation in the following terms: "For the sake of fairness, partial compensation is assured to manufacturers and employers whose interests are directly and sensibly harmed by the prohibition of absinthe." This formula shows that the Swiss legislature was not applying a general principle, but, out of fairness, granting exceptional conditions.

A statute, however, ought always to reserve compensation to persons particularly prejudiced when it prohibits, not because damage is done, but because

the public organisation of the industry is intended. It may then be truly urged that certain persons are unduly burdened and deserve compensation from the national exchequer. Legislation commits no fault in substituting public for private enterprise, but so long as the private enterprise was not harmful it ought not to suffer by the process.

French legislation has several times applied this idea. Compensation was granted to the manufacturers of matches when in 1872 that trade was made a public monopoly. The statute of 1904 on employment bureaux states in its first article that the public bureaux shall receive just compensation before suppression. The Italian Act of 1912 which created a National Institute of Life Insurance refused, however, any compensation to persons or companies engaged in this enterprise. They were not however immediately suppressed but allowed under certain conditions to continue their operations for ten years.[11]

IV

The principle of compensation is thus absent from the statutes. Can the courts grant compensation to persons particularly prejudiced by the application of a new law? Clearly the question does not arise where the statute prohibits acts or adjusts situations

[11] Jèze, Revue de Droit Public, 1912, p. 433. The text of the Italian Law is in the Bulletin de Statistique et de législation comparée, 1912, p. 538. [For the actual history of the Italian law, *cf.* Ferrero, Europe's Fateful Hour (1918), p. 140f.]

which are regarded as contrary to the public interest. But the question does most pressingly arise either where an industry becomes a state monopoly, or where a public service is so changed as to lay heavy burdens on some particular class in the community.

For a long time the courts did not hesitate to refuse all compensation in such cases. On the ground that a statute, because it originates from parliament, is an act of sovereignty, they held that the responsibility of the state was not involved. The leading case on this subject was the Du Chatellier decision of the Council of State in 1838, which refused all compensation to manufacturers involved in the Act of 1835. This act, for fixed purposes, prohibited the manufacture of certain tobacco, and the court held "that the state cannot be held responsible for the consequences of statutes which prohibit certain industries in the general interest." The court gave a similar decision in 1852 in the Ferrier case and in 1879 in the Goupy case. All compensation was refused even to those whose relation to the state was contractual and whose obligation became heavier as the result of new statutes. In the Barbe case of 1883 it held that a contractor to the Ministry of War had no right to any compensation where a new tax was put on dynamite. These decisions aroused no discussion and received unanimous approval from lawyers.

To-day this is no longer the case; or at least much discussion will be necessary to make it the case. It is true that the Council of State, since the case cited,

has not yet had to deal with one in which a private citizen, unbound to the state by any previous and special legal relation, asks compensation for the prejudice caused by a new statute which, for public purposes, prohibits some business in no sense contrary to the public interest. But several times during the last few years the Council of State has dealt with cases in which a private citizen, who had contracted with the state, asked compensation for some unnecessary cost due to statute.

It is well settled that the state cannot by a private act change a contractual situation. But where a material statute has been passed, a general regulation of an entirely personal character; where this statute in no sense modifies the contractual situation but leaves untouched the existing obligations; when to execute them new and unexpected costs are incurred; does the state owe compensation? For thirty years the question was not raised. To-day it arouses vehement discussion.

As early as 1903, as the form of the decision shows, the Council of State had, only after much hesitation, refused compensation to the referees of prison labour who invoked the injury they had suffered by the statutes of 1885 on conditional liberation of 1891 on increase or diminution of penalties and of 1892 on preventive imprisonment.[12] This hesitation is still more clear in the Noire and Baysac case, where a state contractor claimed damages because the Work

[12] Recueil, 1903, p. 306.

Accident Laws of 1898 increased the burdens of his obligations.[13] M. Tardieu, then government counsel, wrote a long and learned brief tending, not without hesitation, to reject the demand because of the entirely impersonal character of the statute; and the Council of State decided in similar fashion. The time has passed when such demands may be rejected by the simple invocation of sovereignty.

The question of the responsibility of the state as legislator is also raised in relation to laws which change the operation of a public service managed by private hands. I have shown above that the government is in law obliged to assure the adequate operation of every public service; and it is in consequence of this duty that they can, unilaterally, by ordinance or legislation, change the principles on which such a service, even when in private hands, can be managed. This makes plain how the question of state responsibility arises when a statute, so passed, makes the position of the private operator of a public service more onerous. It is to-day the clear tendency to recognise that the state must pay compensation. If there is lack of agreement as to the theory by which that duty may be explained, it matters little. The essential and characteristic fact in legal evolution is the recognition of this principle of responsibility. It has been insisted upon by the Minister of Public Works in his explanation of the Act of 1908 which correlated our railway system with our canals. The

[13] Recueil, 1908, p. 20.

result of it was to modify on an important point the principles on which privately managed railroads are to be regulated. "Each time," wrote the Minister, "that the state recognises that the interest of any great public service in private hands involves the increase of the burden implied in the original concession, those private interests have a right to a reparation of the prejudice." The third article of the act explains "that the Council of State shall decide on claims of compensation by the railroads arising out of the present statute;" and even without the text the companies would certainly have led a campaign for compensation. M. Berthet, moreover, who reported the act to the Chamber, said "that this article decides only a question of capacity. It neither establishes nor confirms on behalf of the companies any right to compensation not derived from the ordinary law. It simply gives the Council of State sovereign jurisdiction over claims to compensation made by the companies."

The same question is raised in a particularly interesting way by the laws of 1909 and 1910 on pensions of which the latter was retroactive in character. Here, clearly, was a legislative regulation which modified the condition of service to the detriment of the private companies holding government concessions. Nobody doubted the legitimacy of their action; but nobody doubted also that if the companies could establish a causal relation between the new statute and the increase of their obligations, they could

force the state to pay compensation even if that principle was not expressly provided for in the state.

It is a complete legal system that is in process of formation. It is the business of government to assure the organisation and operation of public utilities; and whatever the method by which they are organised, it can take all necessary steps to that end. But once such steps result in increased burdens on any goods within the state, the national exchequer must pay. The responsibility of the state in its legislative aspect is simply a specific element in a general system.[14]

V

It is in the realm of acts of a judicial kind performed by civil servants that the evolution of public law toward the recognition of responsibility has least advanced. In France, and abroad, it is only in rare cases that the responsibility of the state for such acts has been admitted. What is the reason of this?

One might believe that the main reason is that judicial officers express better and more directly than many others the sovereign will of the state. Of

[14] There is now an abundant literature upon the question of state-responsibility. *Cf.* especially Teissier, La Responsabilité de la Puissance Publique (1908); Tirard, La Responsabilité de la Puissance Publique (1908); de Roux, La Responsabilité de l'Etat (1909); Despax, La Responsabilité de l'Etat (1909); Marcq, La Responsabilité de la Puissance Publique (1911) [and for England *cf.* E. Barker in Political Quarterly, Vol. I, No. 2, and Laski, in Harv. L. Rev., Vol. XXXII, No. 5].

course in the constitutions of 1791 of the year III and of 1848 the judiciary formed a third power equal to but independent of the others and like them expressing the sovereign will of the state. That responsibility was never in question where the act concerned emanated from the legislature, the executive, or the judiciary. But if to-day we still speak of judicial power, it is only by customary usage. There is neither written law nor political doctrine which admits the existence of a judicial power in the sense of 1791. Like administrative officials, judicial officers are simply officers who act. The method of their nomination, their capacity, their status, may differ from those of administrative officials; but at bottom the two classes are similar. It follows that if we unreservedly admit the responsibility of the state for the acts of the administrative officials, the same must be true of judicial officers. The reason of the disparity is not, however, inexplicable.

In the French system, the judicial authority has alone capacity to pass upon criminal trials and every civil case which arises from the relations of private citizens. But its power does not end there. It may also decide every case where administrative law is not involved which directly concerns liberty or property. Arrests, confiscation, requisitions, bail, injunction—all these are within its function. We have thus to distinguish between its jurisdictional and non-jurisdictional power; and it is thus that is explained why

the recognition of state responsibility for judicial action has hardly begun.[15]

The obstacle is in the nature of the act involved. Positive legislation has sought to find a safeguard in the guarantee of independence and wisdom with which they have invested the personnel of the judiciary. However lawyers may differ as to the internal nature of a judicial act it clearly states with the force of legal and social truth, the existence, the non-existence or the extent of a legal situation. A judicial act has the gravest social importance because, perhaps more than any other act, by assuring legal order, it assures social order. Where conflict arises, its business is to say in what consists the measures to secure impartiality and ability in the process; but when every appeal has been exhausted the decision of the court is definitely imposed on every citizen. If the partners concerned could demand compensation, for any reason, on the question that had been judged, the whole problem would be re-opened. That is socially impossible, because it would open up a permanent source of disorder.

It has sometimes been urged that the state ought to be responsible where a prisoner, condemned in an inferior court, is acquitted on appeal, or where the plaintiff in error is successful in the higher court. It

[15] On the character of judicial acts, *cf.* Jèze, Revue de Droit Public (1909), p. 661; Duguit, Traité, I, 260f. [*Cf.* also Duguit, Separation des Pouvoirs, p. 14f; and Dupont, Archives Parlementaires, 1st Series, Vol. XII, p. 140.]

has been urged that in such a case the principle of finality does not exclude the principle of responsibility. That is true enough. But, in neither hypothesis, does the state become irresponsible because of the principle of finality. It escapes responsibility because in a total view of things the function of justice is adequately performed. There is no ground for complaint except against the possible personal fault of the judges in the court below. That might be held to imply their responsibility, but that is already a different question. For long this irresponsibility knew no exception, but in 1895 the act dealing with criminal appeals which modified Article 446 of the Code of Criminal Instruction introduced one. "The decision of the Court of Appeal establishing the innocence of the accused may, at his request, grant him damages for the prejudice caused to him by his conviction. These damages will be paid by the state save where the appeal is against private persons." The legislature here declared itself a partisan of the idea that in such a case the business of justice has been badly performed by condemning definitely an innocent person. Whether there is fault or no in the judicial officer does not matter, the fundamental fact is a miscarriage of justice. The national exchequer must recognise a miscarriage performed for its benefit. There the legislature stops; and it has always been narrowly interpreted.

The same question is raised for non-jurisdictional acts. Here the reasons which obtain in regard to

judicial decisions are not involved; but responsibility has not yet been admitted and seems still far off. Writers of authority, like M. Teissier [16] and M. Garraud,[17] think that state responsibility cannot be involved for arbitrary arrest by an officer of the law. M. Rolland, one of the most recent commentators, has insisted [18] that the irresponsibility of the state must extend from judicial matters to public matters; and notably to the arrests with which they are charged.

In the Bill on the protection of individual liberty, laid on the table in 1904 by M. Clemenceau, one article contained the principle of state responsibility when the police wrongly attacked individual liberty. M. Clemenceau was then a senator; but in his bill of 1907 when he was Prime Minister no such clause is to be found. The text adopted by the senate at the second reading in 1909 contains an article which defines the cases where a magistrate can be sued and makes the following proposal: "The state is civilly responsible for condemnation to damages pronounced against magistrates save for its appeal against the latter." The senate thus recognises the responsibility of the judiciary only for such personal faults as give rise to suit and indirect responsibility on its part. Dominated by outworn civilian theory, it destroys the direct responsibility of the state and is

[16] Teissier, op. cit., no. 42.

[17] Précis de Droit Criminel (1908), p. 943.

[18] Revue de Droit Public (1909), p. 727.

out of harmony with the general evolution of public law.

It may be noted that since 1910 a vote of credit has been granted to the Minister of Justice "for individuals who have been arrested and then released by virtue of decisions in chambers or by reason of a *nolle prosequi* or acquittal by the decision of the court." [19] But in his report of 1910 M. Bourély explained "that we do not intend to recognise any right to compensation on the part of victims of arbitrary arrest; that proposal is reserved until the bill dealing with the guarantees of individual liberty has been examined." But the bill has not been voted upon and it seems postponed to the Greek Kalends.

The only explanation for such an attitude is the erroneous assimilation of two entirely different kinds of acts. It is unconsciously believed that the decision of the court is like the decision of the police. It is an error that has often been denounced but seems endorsed with tenacity. We can only believe that in the end the reality of facts will prove stronger than tradition and that the situation of a judicial officer will be in all non-jurisdictional equated with that of an administrative official.[20]

VI

It is indeed with the latter that the legal system of

[19] Budget of 1912, Journal Officiel, Feb. 28, 1912, art. 23.

[20] *Cf.* Larnaude, Revue Pénitentiare, 1901, p. 185; Lerebourg-Pigeonniere, *Ibid,* p. 1130.

public responsibility has thus far attained its largest development; nor can it be explained save by the complete elimination of the idea of sovereign power. From whatever official the act is derived, whatever the nature of the act involved, public responsibility may be engaged. Nor is distinction made between sovereign and non-sovereign acts. Above all, the last step in this evolution has been taken and government liability may be involved where there is no fault in service.

It is true, of course, that the idea of fault is still found in the reports, but by that is meant, not the fault of a personified service, but the fault of an actual agent. Sometimes the fault is real; in that case it is the basis of governmental penalization, whether the fault is violation of statute or official negligence. Sometimes no such fault is to be found; but the courts insist on assuring the private citizen against the damage that may be caused by the operation of the public service, by making the state responsible. This is what has been called assurance against administrative risk.

Here in all its fullness is made clear a fundamental notion of the new public law. The state is the totality of public services operated by government in the general interest. Once that operation involves special prejudice to a private citizen, the national exchequer must bear the burden of it. This is not a sudden evolution, but it has been a rapid one, and it is perhaps worth while to note its principal stages.

I showed earlier in this chapter that, in a frankly imperialist system, the irresponsibility of the state was a principle to which no exception save expropriation, direct or indirect, and permanent proprietary damage, was admitted. The principle was too narrow to be fundamental. With the increase of state functions the theory of irresponsibility became unattainable. It was seen that the theory, to which some partisans are still attached, of the distinction between irresponsible sovereign acts and responsible non-sovereign acts was involved. To-day that theory is important only as a stage in progress. In the earlier editions of his book on administrative law, M. Berthélemy formulated it as a dogma and as late as 1913 he could still maintain the irresponsibility of the state, save where statute had otherwise provided.[21] But he has been obliged to recognise the emergence of change and the evolution by the courts of the theory of responsibility. He thinks, indeed, that they are contrary to law. "The Council of State," he writes,[22] "is the only judge of the fairness of the compensation demanded. It has not only to ask the source of the evil against which protest is made; it has also to examine the question of its injustice and the merit of compensation. . . . I must insist on the arbitrary appreciation that is here given by the Council of State." In other terms, M. Berthélemy believes that a governmental act raises in law no claim;

[21] Droit Administratif (7th ed.), p. 79.

[22] *Ibid.*, p. 79 and note 1.

in fact, and for reasons of justice, the Council of State affords compensation.

I cannot understand this opposition between equity and law. I do not see how a solution can be true in law and untrue in equity, how a division can be made between theory and practice. The impracticable and the inequitable cannot be legal. Law is the body of rules based upon equity and responding to a practical need. No rule not so distinguished can be a rule of law. If in equity and practise the state is responsible for damage involved in the performance of its functions, the rule of law must conform to that responsibility.

How has that happened? Undoubtedly because the modern mind is dissatisfied with the classic theory of sovereignty; and it is possible to point out the moment when French jurisprudence accomplished the change. In 1899 the Council of State dealt with an action for responsibility brought by M. Le Preux, who had been wounded at Maisons-Alfort (Seine), where the watch is a state service. The plaintiff founded his plea on the negligence of the service. It was rejected on the ground that "it is a matter of principle that the state is not, where it exercises its sovereign power, and notably in regard to the police, responsible for the negligence of its agents. . . . It is admitted that Le Preux may secure personal damages against the officials concerned but that gives no right of action against the state." [23]

[23] Recueil, 1899, p. 17.

This decision was most vehemently criticised by M. Hauriou in a most remarkable note in Sirey.[24] He did not go so far as to recognise the general responsibility of the state. Like the Court, he admitted that state responsibility can only be involved by an act that at each stage of its application bears the marks of sovereign power. He admitted that when the government, as a police regulation, does not enter into direct relation with private citizens it cannot be held responsible. But he forcibly insisted that when the state comes into contact with private citizens in the performance of its functions, no matter of what kind, it ought to be responsible. He urged that it had such relations in the Le Preux case and that the decision of the Council of State was wrong.

The decision aroused much discussion and has had much influence. Several years later a case arose identical to that of Le Preux. Grecco demanded compensation for a wound received in his house at Soukoras (Algeria) by a shot from a rifle of a gendarme, fired at a mad bull which a crowd was chasing. The plaintiff urged that the accident would not have occurred if the police had adequately performed their duty. The Council of State rejected the plea; that the decision contains these significant words: "the evidence does not show that the accident of which the plaintiff had been a victim is due to a fault in the public service for which government would be

[24] Sirey, 1900, III, p. 1.

responsible."[25] M. Romieu, as counsel for government, put the bearing of this statement in the clearest relief: "It is true that for some time jurisprudence has admitted that for acts of police or of sovereignty the state has no pecuniary responsibility. But it has ended by admitting the inconveniences, the contradictions and the injustice to which so general a formula would lead."

Such was the first stage of the evolution. There was no longer to be a distinction between sovereign and non-sovereign acts. Every administrative act could involve state responsibility. The authorities, however, still connected this responsibility with a fault of the public service. How was that to be interpreted? M. Hauriou tried to show that it meant a fault of the state regarded as a person. "The state," he says,[26] "is responsible because the fact of service makes it a fault." But that was not in the mind of the Council of State; when it said "fault of service" it meant "faults committed by agents in that service." It meant that the possibility of such faults involves a risk but that if the risk is realised the state must pay. There was no state responsibility where the agents were not at fault.

On the other hand, the Council did not imagine more than individual administrative acts. Acts of regulation were still surrounded by the penumbra of

[25] Conseil d'Etat, Feb. 1st, 1905, Recueil, p. 140; Sirey, 1905, III, p. 113.

[26] Sirey, 1905, III, 113.

sovereignty; and it was long before that ghost was banished. Meanwhile the Council of State recognised in a whole series of decisions government responsibility. Since 1903 it had implicitly admitted that the state could incur responsibility for the unjust dismissal of a civil servant. It gave compensation for the abusive execution of a decision of a projectoral council. In 1910 the state was compelled to pay damages to certain old soldiers who had been called with undue slowness to civil employment in violation of the Act of 1905. In 1911 the state was declared responsible for the damage caused to a canal boat by the negligence of the lock keepers.

In these different cases there is always mention of a fault in operation or an agent's negligence. But it is to be noted that the Council is generous in its interpretation of fault. It takes it for granted; and as a consequence the administration does not urge concurrent negligence on the part of the private citizen. This presumption of fault was strikingly shown in the Pluchard case.[27] Pluchard was knocked down in a street of St. Denis by a policeman pursuing a criminal and his leg was broken. The policeman was not at fault. He was only doing his duty and the occurrence was a simple accident. Compensation was however granted. "The circumstances show entire absence of negligence on the part of the plaintiff, and the accident must therefore be attributed to a fault in the public service which involves

[27] Recueil, 1910, p. 1029.

the responsibility of the state." Where is the fault? The policeman was pursuing the criminal; he accomplished his task, and the accident was produced by an unhappy chance independent of any negligence. The term only expresses a linguistic tradition. The real evolution has been accomplished. The responsibility of the administration is involved where a special prejudice touches an individual or a group. Administrative risk begets administrative responsibility.[28]

VII

A last step remained. So far, state responsibility has been involved only where individual administrative acts have been concerned. In 1903 when the general responsibility of the state began to be admitted, there was no thought of extending it to government ordinances. M. Hauriou, in the note cited above, recognised without difficulty the irresponsibility of government in this regard. This concept no longer holds good. To-day governmental responsibility is involved no less for ordinances than for personal acts.

This responsibility was recognised in the decision of 1907, which has already been cited. The railway companies urged that the decree of March 1st, 1901, on railroad safety, which modified the previous or-

[28] Note, however, the hesitation of the Council of State in the Ambrosini case; and *cf.* the comment of M. Hauriou, Sirey, 1912, III, 161.

dinances of 1846, was *ultra vires*. It was urged that since their concession was granted on the basis of the decree of 1846 a later regulation involving an increase of expenditure was *ultra vires* by violating an implied contract. The Council of State rejected this application. Government, in its view, has always the right to change the conditions under which the public service is operated. But at the same time it declared that if the companies could show special prejudice by reason of the new decree they would have the right to compensation.[29] Here the responsibility of the state for an act of public administration —an act comparable to formal statute—is clearly admitted.

It has been shown above that the responsibility is not, in fact, contractual; even though the Council of State makes use of that category. The idea of public service is here all-important. The state has the power and duty of modifying by ordinance or formal statute the rules relating to public utility; but it must indemnify all those in a special degree prejudiced by the modification.

The same answer has been given when prefects modify by regulation a local railway or tramway service in private hands by the power conferred on them in the Act of June 11, 1880. The compensation is then borne by the public funds of the department or commune served by the company. This was decided in more different decisions in 1910 by the

[29] Recueil, 1907, p. 913; Sirey, 1908, III, 1.

Council of State. The prefect of the Seine ordered the Metropolitan Company, for the safety of travellers, to make certain changes which increased the expenditure contemplated by the Charter. The Council upheld his decision but admitted the principle of state responsibility. A month later it gave a similar decision in a southern case.[30]

This solution is *a fortiori* applicable where the regulation is illegal. The party concerned can have the act annulled on the ground that it is *ultra vires*; but the period of appeal is very short, being by the law of April 13, 1900, reduced from three to two months. When the period has passed, the party concerned must claim compensation. That has been for a long time admitted without controversy for individual acts; a further step is being taken and the decision is being made applicable to ordinance as well. It is true that, so far, this decision has been made only when municipal decrees are in question; but the principle is no different. A mayor of the Department of Aude ordered the church bells to be rung at civil funerals.[31] The Council of State has often held this act *ultra vires* in view of the law of January 2, 1907. This law declared the churches especially devoted to the Catholic religion, free from lay control in regard to their internal property. In the case quoted the legal period of plea had elapsed. The action for

[30] Recueil, 1910, pp. 97 and 216; Revue de Droit Public, 1910, p. 270.

[31] Le Temps, June 17, 1912.

compensation was won, because the communal exchequer must repair any material or moral prejudice suffered by a private citizen by reason of the police service of the commune.

The vast extension of state responsibility in modern law has received recently a curious application in a decision of the tribunal of the Seine. It forms the epilogue in the long and regrettable Turpin case. Turpin was the inventor of melinite. He brought an action for damages against the state, Schneider & Co., the Iron Company of the Mediterranean and M. Canet. The tribunal of the Seine limited the case to the state and condemned it to pay Turpin one hundred thousand francs in damages. "The acts of the Minister of War," said the court,[32] "have clearly caused Turpin a prejudice for which the state is responsible. . . . This prejudice results from preventing Turpin from opening negotiations with Armstrong; whether because the Department of War left to him the vain expectation of making a new arrangement with France, or because the Department, under false promises of compensation, had obtained the inclusion of certain clauses in his contract with Armstrong . . . clearly Turpin has the right to compensation."

No decision shows better how far our age has travelled from the imperialist conception of law. We need not inquire why the court did not declare itself incompetent in the case nor why the question

[32] Le Temps, Jan. 13, 1911.

was not raised. However that may be, we have a court which unhesitatingly scrutinises and judges the acts of a public service which, if sovereignty were anything more than a mere term, would clothe itself in the cloak of irresponsible authority. The decision recognises that the state is responsible, not for what it has done, but for what it has failed to do. It holds the state responsible for not buying from Turpin his patent, and by its hesitations preventing him from selling his patent to a foreign company, thus causing him damage. The idea of public responsibility based upon public fault could hardly be more clearly vindicated.

It is therefore probable that the restrictions which still limit the general responsibility of the state will soon disappear. The courts have constantly held that for acts of war or diplomacy the state cannot be held responsible. No sovereignty is in question here; for, if it were, internal no less than external security would be protected by it, and both the police and the army would be irresponsible in time of peace. Though that is not the case, yet state responsibility is not involved in these two categories of acts. Thus in 1905 and 1907 a Council of State decided against pleas for compensation for damage inflicted in the Dahomey and Madagascar wars on the ground that military operations on foreign territory cannot give rise to action in the courts.[33] Similarly, in 1904, it refused a plea of prejudice occasioned by diplomatic

[33] Recueil, 1905, p. 226; *Ibid,* 1907, p. 185.

policy on the ground that a question relating "to the exercise of sovereign power in the relation of the French government with foreign governments cannot be brought before the Council of State.[34] The court thus used the idea of sovereignty to evade the idea of responsibility. Dead in the domain of internal public law, it still persists in the realm of foreign policy. But here also it is destined to perish.

VIII

While the responsibility of the state has thus been enlarged, what has been the evolution of the personal responsibility of the civil servant? It has undergone at once extension and precision.

The question of this responsibility is asked in entirely different terms from that of the responsibility of the state. That, as we have shown, is the purely objective responsibility of risk. The responsibility of the civil servant is on the contrary the subjective responsibility of fault. It is they themselves who act, and not some fictive person of whom they are the mandatories or organs. Officials are individuals in presence of other individuals, citizens subject to the control of the courts. The problem of responsibility as between two individuals goes back to a conflict between two wills; responsibility ought naturally to rest upon him who has consciously violated some rule of law. But that is the definition of fault.

[34] Recueil, 1904, p. 873; Revue de Droit Public, 1905, p. 98.

The evolution of public law has been the determination of the cases and conditions in which the fault of a civil servant is such as to make it purely his personal responsibility, and not that of the state, to some private citizen. This evolution is to-day practically completed. There is a complete category of civil servants in relation to whom the evolution of our jurisprudence is strictly limited by the rules of our Code of Procedure (Arts. 505-516). This text recognises, doubtless, the personal responsibility of the judiciary, but under strict limitations. It enumerates definitely the cases in which they can be made responsible and the method by which it may be engaged. That can be done only where there is some kind of fraud, whether in the course of proceedings, or at the moment of the verdict, or when there is the denial of justice; that is to say, when the judge "refuses to answer requests or neglects to pass on cases that have been, or are about to be, determined."

This is an antiquated legislation no longer adapted to the situation of our public law; sooner or later its rigid limits will be widened. Certain attempts, indeed, have already been made in this direction. In the preamble to his statute on the protection of individual liberty, M. Clemenceau, in 1904, as simple senator, declared that the basic guarantee of individual liberty was a well-organised responsibility of the judicial office. The same ideas underlay the proposal of M. Cruppi in 1905. The proposal, read a second time by the senate on March 2, 1909, enlarged

and made precise those cases where judicial officers can be held personally responsible; but the special procedure was retained in a fashion so technical that, as was said in the discussion, only two cases had been successful since the promulgation of the code. The pith of the matter lies there.

IX

No texts restrict the responsibility of administrative civil servants, and our evolution goes forward without hindrance. The Constitution of the year VIII, while it maintains the principle of responsibility formulated by the earlier constitution, subordinates every penal or civil action against a civil servant to the prior authorisation of government through the Council of State (Art. 75). That destroyed all responsibility; and throughout the Restoration, the liberal party bitterly criticised this rule without success. Art. 67 of the Charter of 1830 announced a statute on the responsibility of officials; a bill was brought forward and there were, particularly in 1835, long and confused discussions. All to no end; Art. 75 remained always in force. The Republic of 1848 did nothing and, naturally, the Second Empire took care to prevent its abrogation. Since the Council of State had still only a consultative power—every action against the civil service was subordinated to the pleasure of government. At the end of the Second Empire the abrogation of Art. 75 was one of the

essential principles of the liberal and republican program. One of the first acts, therefore, of the government of National Defence was the decree of Sept. 19, 1870, abolishing all restrictions of this kind.

This text, which seems clear enough, yet gave rise to great controversy of which the interest is not merely historical. The law has been settled by a decision of the Court of Conflicts based on the report of M. Mercier in the Pelletier case. This was an action for responsibility, brought before an ordinary court, by the owner of a newspaper which had been suspended by General Ladmirault, in command of the Department of the Oise, then in a state of siege. The court said that "the decree which abolishes Art. 75 has only put an end to that non-receivability which gives to the ordinary courts complete freedom of action within the limits of their capacity; but it has not extended their jurisdiction, or suppressed the prohibition against them, to take cognisance of administrative acts." The decision then insisted on the administrative character of the act leading to the prosecution, and said: "Outside this act the plaintiff has imputed to the defendant no personal act involving his private responsibility." [35]

So was created by the Court of Conflicts the distinction between official and personal acts. For official acts the government alone, and not the civil servant, is responsible; the latter is only responsible for personal acts and most often the Court of Conflicts

[35] Recueil, 1873, suppl. I, p. 117; Sirey, 1874, II, 28.

decides if the act is personal. Where the official is taken before the civil court, the prefect will bring it before the administrative tribunal. If the latter thinks that the act is of an official nature, it confirms the prefectorial decision; otherwise it sends it back to the ordinary court and the latter then proceeds in its usual manner. The Court of Conflicts thus exercises a power which is not its own in law. In reality, it does not pass upon a question of capacity, which is not a matter of debate, but upon the question of whether, the act having been shown to have been done, it was official or personal. The result has been that the business of jurisprudence has been the discovery of a criterion by which to distinguish personal from official acts.

Some decisions settle personal faults by degree of fault; when the official has made a great mistake the act is personal. That is contrary to the most recent decisions which, in the words of M. Hauriou, make the civil servant responsible only where his act is out of relation to his function. The fault may be inexcusable and yet be official if it is inherent in his position; it may be light and yet personal because it is not so inherent. Its gravity will make him responsible to the state even while it leaves him irresponsible so far as the private citizen is concerned.

This is logical enough. It has been shown above how in the theory of the modern state the responsibility of the state is not subjectively recognised; nevertheless, the private citizen is so to speak insured

against the risks arising from each public department by claims in its special budget. Every time the department acts, the citizen has his safeguard, but not otherwise; in other cases it is the civil servant alone whom he can make responsible. That clearly emphasises our conception of the state as a complex public service corporation. A personal act is obvious when the civil servant either breaks the rules, or goes beyond his powers; as, for instance, in pursuing some personal vengeance or, as in the Morizot case, a flagrantly blasphemous end. If, on the other hand, his act is merely *ultra vires* in some form, his lack of intention negatives his personal responsibility because, although he has gone beyond his powers, he has nevertheless had his proper function in view.

It is impossible to cite the numerous cases which mark the stages of this evolution; some of the most important only can be noted. On Jan. 1st, 1909, S., an inspector of indirect taxes, verifying the books of the tobacco bonding house of Toulouse insisted that there were irregularities and accused the boy clerk of dishonesty and called him a thief. The boy was dismissed and summoned the inspector before the Correctional Court of Toulouse. The prefect took the case to the Administrative tribunal, but his decision was annulled on the ground that "the facts show clearly that they had no connection with S.'s administrative function and were exclusively personal to himself." [36]

[36] Recueil, 1909, p. 726.

The Court of Conflicts has very clearly admitted this definition of personal as equivalent to the pursuit of an end unconnected with function in the Morizot case. M., a teacher in the commune of the Department of the Côte-d'Or, made obscene remarks before his class, slandered the army, apologized for certain criminal acts, and blasphemed certain religious and Catholic beliefs. The fathers of his pupils summoned him before the courts and claimed 2,000 francs damages. The prefect removed the case to the Administrative Courts; but that tribunal, basing itself upon the admirable report of M. Tardieu, annulled his decision. "The defendant's remarks," it said,[37] "cannot if proved be considered as in any way connected with the teaching which is his function . . . and therefore constitute a purely personal fault."

Another case is of interest. A mayor gave orders to a municipal official to sound the church bells at a civil funeral. He was sued by the curate and the case was removed to the Administrative courts. The Court of Conflicts annulled the decision on the ground that the text neither of statute regulation nor of local custom authorised the mayor to act in this fashion; what he did was therefore personal to himself.[38]

Where the personal responsibility of the civil servant is engaged, no parallel responsibility attaches to

[37] Recueil, 1908, p. 597; Sirey, 1908, III, 83.

[38] Recueil, 1910, pp. 323, 442; Sirey, 1910, III, 297.

the state. This has sometimes caused surprise, but only among those writers dominated by the theories of the Roman law. They forget that the state is not a person responsible for the acts of its agents and that by its responsibility we only mean an assurance to the citizen against the results of its operations. Clearly the public treasury cannot pay for faults unconnected with the duties of the state.

CONCLUSION

AT the beginning of this book I pointed out that public and private law evolve on parallel lines. In private law the autonomy of the human will is in process of disappearance; the individual will is powerless by itself to create a legal situation. In public law we no longer believe that behind those who hold office there is a collective personal and sovereign substance of which they are only the agents or organs. In government we see only those who exercise the preponderant force and on whom, in consequence, there is incumbent the duty of fulfilling a certain social function. It is the business of government to organise certain services, to assure their continuity, and control their operation.

Public law is thus no longer the body of rules regulating the relation of a sovereign state with its subjects; it is rather the body of rules inherently necessary to the organisation and management of certain services. Statute is no longer the command of the sovereign state; it is the organic rule of a service or body of men. An administrative act is no longer the act of an official who gives commands or of a public servant who fulfils a command; it is always an act made in view of the rule of service. The problems

such acts involve are always submitted to the judgment of the same courts. If the act violates a statute every affected person can demand its annullment, not as a subjective right but in the name of the legality that has been violated. The responsibility of the state is generally recognised. It is not the responsibility of a person for faults but a public assurance, through public funds, against the risks involved in service. If the official goes outside his functions his personal responsibility becomes involved.

Thus public law like private law is coming to be interpreted realistically and socially. Realistically, in its denial of a personal substance behind actual appearance, in its refusal to admit the existence of a self-determined and universally imposed will, and in its derivation from the idea of a function that is necessarily imposed on government. It is a social conception, in that public law no longer has as its object the regulation of the conflicts that arise between the subjective right of the individual and the subjective right of a personified state; it simply aims at organising the achievement of the social function of government. For, be it remembered, the plea of *ultra vires*, which is at the root of public law, is not based upon the violation of individual right but upon the destruction of an organic rule of service.

This evolution is not at its end; indeed, there is a sense in which it will never end. Social evolution is of infinite complexity and indefinite duration; law is no more than its protective armament. The genera-

tion that went before believed that its system of law, metaphysical, individualistic, and subjective, was definite and final. Let us not commit a like mistake. Our own system, realist, social, and objective, represents but a moment of history; and before it has been finally builded the keen observer will note its transmutation into a newer code. The generation that is to come will be happy in so far as it is able, in better fashion than ourselves, to achieve freedom from its dogmas and its prejudices.

BORDEAUX,
Jan. 31, 1913.

THE END

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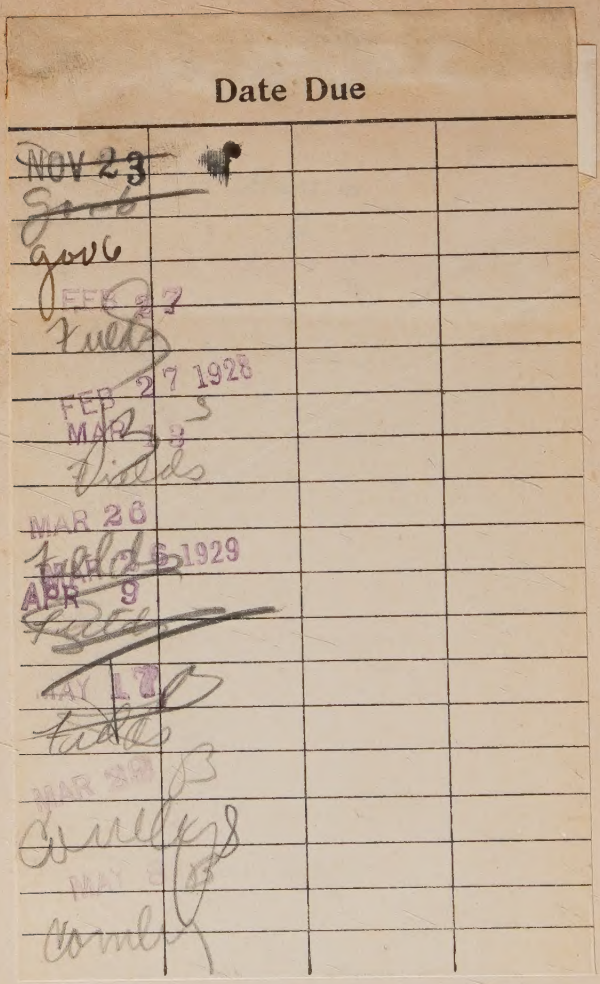

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